TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. [illegible] 199

PHILIP PHILLIPS, PLAINTIFF IN ERROR,

vs.

JAMES S. NEGLEY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 28, 1883.

SUPREME COURT OF THE UNITED STATES.

No. .

PHILIP PHILLIPS, PLAINTIFF IN ERROR,

vs.

JAMES S. NEGLEY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	page
Declaration	1
Summons	4
Def't's Plea	4
Joinder & Note of Issue	6
Verdict & Judgment	7
Motion to vacate Judg't	8
Order of Court vacating Judg't	8
Bill of Exception	9
Note of Appeal	19
Motion to dismiss appeal	19
Proceedings in General Term	20
Writ of Error (Bond for)	20
Writ of Error & Citation	21
Authentication of Record	22

In the Supreme Court of the District of Columbia.

In General Term..

RECORD.

[Filed August 29, 1874—R. J. Meigs, Clerk.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

The 29th day of August, 1874.

PHILIP PHILLIPS	)	No. 12,890.
vs.	(	At Law.
JAMES S. NEGLEY.	)	Docket No.

The plaintiff sues the defendant for money payable by the defendant to the plaintiff, for that whereas the said defendant, together with one Simon Witkowski, on the 18th of May, 1874, at the city of Washington, in the District aforesaid, drew his certain draft or order in favor of said plaintiff, and directed the same to Charles F. Peck and Charles E. Hovey, requesting them to pay to said plaintiff the sum of four thousand three hundred and sixty-eight dollars, and then and there delivered said order to said plaintiff, who then and there presented said order to the drawees, who then and there accepted the same.

That afterwards, to wit—when by the terms of said acceptance the said order became payable—the same was duly presented to the acceptors for payment, who refused to pay, and thereupon the said order was protested for non-payment, of all of which the said drawers had due notice; and the plaintiff avers that the said Simon Witkowski is a non-resident of this District and is not to be found within the same.

And the plaintiff further avers that the said defendant is also indebted to him in the other sum of $4,368, for so much money had and received to his use.

He therefore claims $4,368, with interest thereon, at the rate of 6 per cent. per annum, from the 18th day of August, 1874, according to the particular of demand herewith filed, besides costs, and damages on protest of said draft.

P. PHILLIPS,
Att'y for Plff.

[Notice to Plead.]

The defendant is to plead hereto on or before the first Special Term of the Court, occurring 20 days after service hereof; otherwise judgment.

P. PHILLIPS, *Att'y for plff.*

[Verification.]

P. Phillips makes oath that the cause of action herein against the defendant, and the sum claimed to be due from, and payable by, him, by reason of the premises, exclusive of all set-offs and just grounds of defense, are distinctly and truly set out in the foregoing declaration and particular of demand thereto annexed.

P. PHILLIPS.

Sworn and subscribed before me the 29 day of August 1874.

R. J. MEIGS, *Clerk*,
By J. JAY CAMP, *Asst. Clk.*

WASHINGTON, D. C.,
May 18th, 1874.

$4,368.

Pay to P. Phillips the sum of four thousand three hundred and sixty-eight dollars.

Very respectfully,
SIMON WITKOWSKI,
JAS. S. NEGLEY,
Attorney for Mrs. Witkowski.

To CHARLES F. PECK.
CHARLES E. HOVEY.

Protested for non-payment Aug. 21, '74.
J. MCKENNEY, *N. P.*

We accept the above order, and will pay the sum therein stated out of the money received by us at the Treasury of the United States arising from a judgment in the Court of Claims in the case of Simon Witkowiski, No. 3559.

CHAS. E. HOVEY.

I accept on the above terms, my fees being first paid.

C. F. PECK.

Endorsed —[P. Phillips has this day made demand on me for pay't of the within acceptance, and I answered I have received no funds with which to pay. C. E. HOVEY, Wash'gton, D. C., Aug. 20, 1874.]

DISTRICT OF COLUMBIA, } *sct.*
WASHINGTON COUNTY, }

By this public instrument of protest, be it known that on the 21st day of August, in the year eighteen hundred and seventy-four, at the request of P. Phillips, Esq., holder of the original acceptance hereto attached, I, John McKenney, Notary Public, residing in said county, duly commissioned and sworn, presented said acceptance first at the office of Chas. E. Hovey, and demanded payment thereof, which was refused, and I was answered, "Mr. Hovey is not in the city. He left no directions about it." I then demanded payment at the office of C. F. Peck, the other acceptor, which was refused, and I was answered, "Mr. Peck is not in, and left no directions about it."

Therefore I, the said Notary, at the request aforesaid, have protested, and by these presents do solemnly protest against the drawer, acceptors and indorsers, of the said acceptance, and all others whom it may or doth concern, for all cost, exchange, re-exchange, charges, damage and interest, suffered or to be suffered for want of payment thereof. And on the same day I addressed and deposited in the Post Office of Washington, D. C., written notice of protest to drawers and each endorser, viz:

Notice for Simon Witkowski, directed to him, New York City, N. Y.
Do. Jas. S. Negley, do. " " Pittsburgh, Pa.

In testimony whereof, I have hereunto set my hand and affixed my Notarial Seal of office, the day and year aforesaid.

[SEAL.]

J. MCKENNEY,
Notary Public.

Protesting,	$1 75
Notices,	20
Postage,	06
	$2 01

Recorded, Book No. 4, Fo. 201.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

The 29th day of August, 1874.

PHILIP PHILLIPS, *Plaintiff*,
vs.
JAMES S. NEGLEY, *Defendant.* } At Law No. 12,890.

The President of the United States
to the Defendant, GREETING:

You are hereby commanded to appear in this Court, on the first day of its Special Term, occurring 20 days after service of this WRIT on you, to answer the Plaintiff's Suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

[SEAL.] D. K. CARTER,
Chief Justice.

WITNESS:
P. P. R. J. MEIGS, *Clerk*,
By J. JAY CAMP, *Ass't Clerk.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

I do hereby authorize and depute James Edwards to serve this writ.
ALEX. SHARP, *U. S. Marshal, D. C,*

AUGUST 29th, '74.

Issued August 29, 1874.

Served copies of the declaration, notice to plead, and this summons, on the Defendant, the 29 day of August, 1874.

A. SHARP, *Marshal.*
EDWARDS.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Filed October 26, 1874.—R. J. Meigs, Clerk.

P. PHILLIPS, *Plaintiff*,
vs.
JAMES S. NEGLEY, *Defendant.* } At Law No. 12,890.

Now comes James S. Negley, the defendant above named, who, being duly sworn, deposes and says that he has, as he is advised and believes, a full, just, and legal defence to the whole of plaintiff's said claim as follows, to wit:

That it is not true, as alleged in plaintiff's affidavit, that

this defendant, on the 18th day of May, 1874, at the city of Washington, together with one Simon Witkowski, drew a draft or order on Charles F. Peck and Charles E. Hovey for the sum of four thousand three hundred and sixty-eight dollars, and it is not true, as alleged, that this defendant ever delivered such a draft or order to the plaintiff, nor was the same accepted by the alleged drawees.

It is true that, on or about the 18th day of May, 1874, as attorney in fact for one Mrs. A. V. Witkowski, duly appointed such by a power under seal bearing date the first day of May, 1874, this defendant did, together with Simon Witkowski, the husband of said Mrs. A. V. Witkowski, sign and deliver an order on Charles F. Peck and Charles E. Hovey, who were acting as attorneys in prosecuting a claim of said Witkowski's against the United States, and which claim had become by assignment the property of the said Mrs. A. V. Witkowski; and this defendant believed that said order, being for the amount of four thousand three hundred and sixty-eight dollars, was accepted by said Peck and Hovey. But this defendant expressly denies that the said order was drawn by him individually, or that the same created, or was intended to create, any individual liability on his part; and avers that the said paper or order, so far as the same had or has any force or validity, it is the act of the said Mrs. A. V. Witkowski and not of this defendant, and he is not answerable therefor in this action.

And this defendant further avers, on information and belief, that the said order was given by said Simon Witkowski and Mrs. A. V. Witkowski, through this defendant, as her attorney, upon misinformation and under a mistaken belief that the sum of money therein named was due and coming to the said plaintiff by the said S. Witkowski; whereas this defendant avers, on information and belief that no such sum of money was legally and fairly due and coming to the said plaintiff. And this defendant further

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

PHILIP PHILLIPS,
vs.
JAMES S. NEGLEY. } No. 12,890, Law.

To WM. F. MATTINGLY, ESQ.,
Attorney for Plaintiff:

You are hereby notified that on Saturday the 2d day of December, 1882, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard, the defendant will call up his motion to vacate the judgment and set aside the verdict herein, which motion is to be heard upon the record and affidavits of defendant and Richard Harrington, filed herein.

EDWARDS & BARNARD,
Attorneys for Defendant.

Service and copy of affidavits of defendant and Harrington, and of motion filed herein acknowledged this day of November, 1882.

for Plaintiff.

Proceedings before the Supreme Court of the District of Columbia, holding a Special Term and Circuit Court in and for said District, commencing on the third Monday, being the 16th day of October, A. D. 1882.

MONDAY, *October 16th, 1882.*

By order of Arthur MacArthur, Justice, one of the justices of said Supreme Court, presiding, the court opened by proclamation of the Marshal, pursuant to rule of court.

* * * * * *

SATURDAY, *December 2d, A. D. 1882.*

Session resumed pursuant to adjournment, MacArthur, Justice, presiding.

* * * * * *

PHILIP PHILLIPS, *Pl'ff,*
vs.
JAMES S. NEGLEY, *Def't.* } At Law. No. 12,890.

This cause coming on to be heard upon the defendant's motion to vacate the judgment and set aside the verdict entered herein *ex parte* on the 3d day of April, 1879, because of irregularity, surprise, fraud and deceit, and the same having been argued by counsel on both sides, and duly considered, it is considered by the court that said verdict and judgment be, and the same is hereby, vacated, set aside, and for nothing held, and a new trial granted.

BILL OF EXCEPTION.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,
the 9th day of December, 1882.

PHILIP PHILLIPS, *Plaintiff*,
v.
JAMES S. NEGLEY, *Defendant*. } At Law. No. 12,890.

On the 2nd day of December, 1882, at the hearing of the motion filed in this cause by the defendant, on the 4th day of September, 1882, to vacate the verdict and judgment thereon on the 3d day of April, 1879, rendered and recovered against him in favor of the plaintiff, the defendant, in support of his said motion, read to the court the two certain affidavits hereunto annexed, marked, respectively, A and B, and hereby made part of this bill of exception, and the plaintiff, in resistance and against the allowance of the said motion, thereupon, read to the court the two certain affidavits hereunto annexed, marked, respectively, C and D, and hereby also made part of this bill of exception.

And the only evidence offered by the defendant or the plaintiff, or heard or considered by the court, upon the hearing of the said motion, or in connection therewith, were the said four affidavits, so marked as aforesaid.

And upon the said motion, and upon the said four affidavits, as evidence, and upon them alone, the court, on the said 2nd day of December, 1882, after argument, as well on behalf of the defendant, in support of the said motion, as on behalf of the plaintiff, in resistance thereof, granted the said motion, and ordered and directed that the said verdict and judgment so by the plaintiff recovered against the defendant, on the 3d day of April, 1879, be vacated and held for nought, and a new trial granted the defendant, in the words and figures following, to wit:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

The 2d day of December, 1882.

PHILLIP PHILLIPS, *Pl'ff*, }
vs. } At Law. No. 12,890.
JAMES S. NEGLEY, *Def't.* }

This cause came on to be heard upon the defendant's motion to set aside the verdict entered herein *ex parte*, on the 2nd day of April, 1879, because of irregularity, surprise, fraud, and deceit, and the same having been argued by counsel on both sides, and duly considered, it is considered by the court that the said verdict and judgment be, and the same are hereby vacated and for nothing held, and a new trial granted.

And, at the time the court granted the said motion and ordered and directed the said verdict and judgment to be vacated and for nothing held, and a new trial to be granted to the defendant, the plaintiff duly excepted to the granting of the said motion and to such the order and direction of the court, and prayed the court to sign and seal this his bill of exception, which is now, *nunc pro tunc*, during the continuance of the term whereat the same motion was granted and the said order and decision were given, accordingly done this ninth day of December, A. D. 1882.

ARTHUR MACARTHUR, (SEAL.]
Justice.

Settled this 9th day of December, 1882

JOHN SELDEN, *Att'y for Plaintiff.*
EDWARDS & BARNARD, *Att'ys for Def't.*

"A"

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

PHILIP PHILLIPS }
vs. } No. 12,890, at Law.
JAMES S. NEGLEY. }

James S. Negley swears that he is the defendant in the above entitled suit, and that he has a good and meritorious

defense to said action, if he can be allowed to make the same.

That he is not in any way indebted to the plaintiff herein, and was not indebted to him in any manner at the date of the bringing of this suit.

That, as shown by the declaration and record herein, this defendant was sued as a drawer of an order, jointly with one Simon Witkowski, this affiant signing the said order, not in his individual and personal capacity, but in the capacity of attorney for Mrs. Witkowski; and affiant is also sued for money had and received to plaintiff's use.

That as to the money count, affiant says he never received any money, and never had any money, for the use of the plaintiff.

And as to the special count, on the said order, he says that the said order was on behalf of Mrs. Witkowski, and was her act; and that the plaintiff well knew when he received the said order that it was her order and not affiant's, and that affiant was attorney in fact for her, and he received it as such act of hers. That plaintiff then well knew affiant had no funds in the hands of said *drawees*, and that Mrs. Witkowski did have funds or credit there; and so said plaintiff accepted said order without any intention of holding, or attempting to hold, this affiant personally responsible for its payment.

And affiant further says that if it had been the purpose of said order, and of said plaintiff, to create and hold a personal liability against this affiant, that he was entitled to notice of the conditional acceptance which the plaintiff took from the drawees of said order; and that no notice of such conditional and irregular acceptance was given to, or received by him, and no notice of non acceptance of said order, in accordance with its terms, was ever given to or received by him.

Affiant further says that he resided in the city of Pitts-

burgh, and State of Pennsylvania, and is a citizen of said State; and that he was such resident and citizen at the commencement of this suit, and has been such ever since. That while temporarily in Washington City he was served with notice of this suit; and he was recommended to one Richard Harrington, Esq., as a reputable and competent attorney, and a member of the bar of this court in active practice, as a suitable person to defend him in the said action. That he thereupon employed said Harrington, and placed his defense in his hands, furnishing him with an affidavit of affiant's defense.

That affiant was thereafter advised by his attorney that the proper defense had been put in, and that the plaintiff could not recover a judgment against this defendant in this action.

That affiant received no further notice or information in reference to the said suit, from the fall of 1874 until on or about the 26th day of July, 1882, when he was greatly surprised to be served with notice of a suit in the Common Plead Court, No. 1, of Allegheny County, Pennsylvania, which suit was based upon a transcript of a judgment in this case; and which judgment, on inspection of said transcript, seems to have been rendered in this court on the 3d day of April, 1879, in the absence of this defendant and his said attorney.

And on further inspection of the copy of record herein, and on making inquiries, he is informed and believes, and therefor avers the facts to be, as follows:

That after his defense was made known, by special plea, in the form of an affidavit, to wit: October 26, 1874, the plaintiff seemed to have abandoned the case, and thereby to mislead affiant's attorney. That said plaintiff took no notice of affiant's said plea, though served with copo thereof at the time, as he is informed, until the 3d day of May, 1877, more than two years and a half after the filing of said plea.

That the plaintiff's attorney then filed a joinder of issue and note of issue, as shown by the record; but affiant is informed that no notice of trial was given as required by the rules of this court.

That long before the filing of said joinder and note of issun, the said Harrington had, without affiant's knowledge, removed from the said city of Washington, and had thereby left this defendant without any attorney in this case; and affiant believes that such removal and absence of attorney was well known to plaintiff and his counsel, at the time said joinder and note of issue were filed.

Affiant further says that the said proceedings were a fraud upon his rights, and ought not to have been taken without notice to himself or to his said attorney, so long after the said plaintiff was barred of his right to file a replication or joinder of issue, by the rules of this court.

That thereafter, to wit: April 3d, 1879, and without any notice to this affiant of the said cause being upon the trial calendar, the said case was called for trial before his honor, Justice Cox, holding the Circuit Court; and in the absence of affiant and his said attorney, the plaintiff, by his attorney, well knowing that affiant was totally and wholly ignorant of the proceedings herein subsequent to the filing of said plea, as he verily believes, called for a jury and had the jury sworn to try said cause; and without proof, as he believes, other than the production of said order, received a verdict from said jury for the amount thereof, with interest, and thereupon procured the entry of this judgment.

That no notice whatever of said proceedings was thereafter given to or received by the affiant until the said suit entered in Pennsylvania, in July, 1882. That no writ of *fieri facias* was issued, or other proceedings had in this court, subsequent to the rendition of said judgment.

That affiant has lately, and since sued on said transcript, July, 1882, learned that said Harrington removed to the

State of Delaware, from the District of Columbia; and that he has resided in said State permanently since about the day of , 1875, and discontinued practice in this court.

That had this affiant known of the removal of said Harrington, or of the attempt of the plaintiff, or his attorney, to proceed in said case, after his long silence and default therein, he would have employed other counsel at once, and would have appeared at the calling of said case for trial.

That he is advised that the advantages taken of his non-residence and absence, and of the non-residence and absence of said Harrington, his attorney, under the circumstances of this case, is most unjust and unconscionable, and would not be countenanced in any court; and that this case, having never been heard upon the merits, it is still within the power of the court to vacate said judgment and correct this proceeding, as justice requires.

That he is further advised that the said plaintiff was not entitled to have a jury sworn in this case, under the rules of the court; and that the judgment herein on the verdict can have no greater merit than a judgment by default.

He therefore prays the court to vacate and set aside the said verdict and judgment, and to allow this defendant to make his defense herein.

(Signed) JAS. S. NEGLEY.

Subscribed and sworn to before me, this 25th day of August, 1882.

[NOTARIAL SEAL.] H. T. HANNA,
Notary Public in and for the County of Allegheny and State of Pennsylvania.

"B."

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

PHILLIP PHILLIPS
vs.
JAMES S. NEGLEY. } No. 12,890 Law.

Richard Harrington, being duly sworn, deposes and says:

That he was the attorney for the defendant in the above-entitled suit, and as such filed pleas for him therein on the 26th day of October, 1874. That no issue was joined on said pleas or other action taken thereon at the time by the plaintiff, under the rules of the court; and affiant understood that the plaintiff had abandoned his said suit, and affiant believes he so informed his client, the defendant herein. That affiant removed from the District of Columbia on or about the first day of March, 1875, and has not since resided or practiced therein, and that on such removal he undertook to notify all his clients. That having considered this case at an end, by reason of the plaintiff's failure to join issue or take action on the pleas herein, as required by the rules of the court, he did not notify the defendant, Gen. Negley, of his removal.

That he never had any notice that issue was joined on the pleas herein, or that the case was set down for trial, or that judgment had been entered herein, until August, 1882, when he was notified by letter from Messrs. Edwards & Barnard.

That the plaintiff, and his attorney, Wm. F. Mattingly, well knew when joinder of issue and note of issue were filed herein, that affiant had removed from said District, and that his address was Dover, Delaware; but, notwithstanding such knowledge, no notice was received by him, in any way, of the plaintiff's action herein.

RICHARD HARRINGTON.

Subscribed and sworn to before me this 6th day of November, 1882.

[SEAL.]

JOHN S. JESTER,
Notary Public.

"C."

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

PHILIP PHILLIPS
vs.
JAMES S. NEGLEY. } No. 12,890—Law.

William F. Mattingly, being duly sworn, says: That more than ten days prior to May Term, 1877, of the Circuit Court, Richard Harrington, the defendant's attorney, having left this District, and said defendant being a non-resident, he, this affiant, as attorney for the plaintiff, mailed to said Harrington at his address in the State of Delaware due notice of the trial of the issues joined in this action, with a copy thereof; and at the same time, from abundant caution, inquired of the plaintiff as to the post-office address of the defendant, and was told by the plaintiff the name of the place of residence of the defendant (which affiant has now forgotten) in the State of Pennsylvania, and affiant mailed to said defendant at said address in Pennsylvania a copy of said joinder of issue and notice of trial. Neither of said papers so mailed to said Harrington and to said defendant were returned to this affiant, as they would have been by the Post-Office Department had the same not been delivered, the envelopes having printed on them affiant's name and address in this city. This statement is based upon the fact that letters in similar envelopes have frequently been returned to affiant where the persons to whom addressed could not be found. Affiant caused this case to be placed on the trial calendar for the May Term 1877, and it remained upon the calendar of each succeeding term of the Circuit Court until the January Term, 1879, at which term it was tried and verdict and judgment rendered.

WM. F. MATTINGLY.

Subsribed and sworn to before me, this 29th day of November, A. D. 1882.

R. J. MEIGS,
Clerk.

"D."

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

PHILLIP PHILLIPS
vs.
JAMES S. NEGLEY.

No. 12,890. At Law.
Motion to vacate judgment.

THE AFFIDAVIT OF PHILLIP PHILLIPS,

This affiant saith, in answer to the motion of the said James S. Negley to vacate the judgment in the said case that the verdict on which the said judgment is founded was rendered upon the evidence of the said order, mentioned in the affidavit of the said Negley, and upon the testimony of this deponent to the effect that after the delivery to him of the said order by the said Negley and the said Simon Witkowiski, and after the said Witkowiski had received from this deponent receipts and acquittances of the several debts of him, the said Witkowski, which were to be paid out of the proceeds of the said order, he, the said James S. Negley, with full knowledge of said facts, procured the fund on which the said order was drawn to be paid into his hands instead of the hands of the drawees and acceptors of the said order, and in manifest disregard of his duty in the premises, wholly failed to apply the said fund to the satisfaction of the said order or any part thereof. Wherefore this deponent doth further say that the said James S. Negley did have and receive the said fund and money to the use of this deponent, anything in the affidavit of the said Negley to the contrary notwithstanding.

And this deponent further saith that the proceedings in the said suit were carried on by him and his counsel in good faith, and that anything to the contrary alleged by the said Negley is wholly false and unfounded.

And this deponent further saith that the matters and things contained in the affidavit accompanying the said defendant's motion are substantially the same as were urged by him in defense of the suit brought by this deponent on

the said judgment in the Court of Common Pleas of Allegheny County, Pennsylvania, in which said suit this deponent hath obtained a judgment, on which the said defendant hath sued out a writ of error, and further this deponent saith not.

PHILLIP PHILLIPS.

DISTRICT OF COLUMBIA—*ss.*

Subscribed and sworn to before me this 2d day of December, 1882.

A. C. RICHARDS,
Notary Public.

Note of Appeal.

Filed December 9, 1882.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, the 9th day of December, 1882.

PHILIP PHILLIPS
vs.
JAMES S. NEGLEY. } At Law. No. 12,890.

The clerk of said court will enter my appearance and note an appeal for the plaintiff to the general term from the order passed in this cause on the 2nd day of December, 1882.

JOHN SELDEN,
Attorney for Plaintiff.

Motion to Dismiss Appeal.

Filed February 15, 1883.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, in General Term.

PHILIP PHILLIPS
vs.
JAMES S. NEGLEY. } No. 12,890. Law.

Now comes the defendant, by Messrs. Edwards & Barnard, his attorneys, and moves the court to dismiss the appeal herein, and to remand the case to the Circuit Court for trial, for the reason that an appeal does not lie to this court from an order made at the Circuit Court, or special term, setting aside a verdict and judgment thereon for plaintiff, and granting a new trial on defendant's motion.

EDWARDS & BARNARD,
Attorneys for Defendant.

Proceedings in General Term.

Proceedings before the Supreme Court of the District of Columbia, in general term, commencing January 22, 1883, in pursuance of the order of the court of December 18, 1881, ante page, 199.

Present Chief Justice Cartter and Justices MacArthur, Hagner, Cox, and James. Absent, Justice Wylie, holding Criminal Court.

* * * * * * *

FRIDAY, *February* 16, 1883.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Hagner and Cox.

* * * * * * *

PHILIP PHILLIPS, Plaintiff,
vs.
JAMES S. NEGLEY, Defendant. } At Law. No. 12,890. Cal. 87.

Argued by Mr. Barnard, upon the defendant's motion to dismiss the appeal herein, and to remand the case to the Circuit Court in support of the motion, and by Mr. Selden, contra. Submitted to the court.

* * * * * * *

MONDAY, *February 19, 1883.*

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Hagner and Cox.

* * * * * * *

PHILIP PHILLIPS, Plaintiff,
vs.
JAMES S. NEGLEY, Defendant. } At Law. No. 12,890. Cal., 87.

Now come here as well the plaintiff as the defendant, by their respective attorneys, whereupon, because it appears to the court here that there is no error in the record and proceedings of the special term, therefore, the court remands the case to the special term, there to be proceeded with as if no appeal had been taken from its order of December 2, 1882, which appeal is hereby dismissed with costs, to be taxed by the clerks. The plaintiff gives notice that he will prosecute a writ of error, and the penalty of his supersedeas bond is fixed at $500.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,
the 20th day of February, 1883.

PHILIP PHILLIPS,
vs.
JAMES S. NEGLEY } No. 12,890, In Error.

Know all men by these presents, That we, Philip Phillips and W. Hallett Phillips, both of the City of Washington, in the District of Columbia, are bound unto the above-

named James S. Negley, of the City of Pittsburg, in the State of Pennsylvania, in the sum of five hundred dollars, of lawful money of the United States, to be paid to the said James S. Negley, his executors, or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this nineteenth day of February, 1883.

Whereas the above-named Philip Phillips has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said Supreme Court of the District of Columbia;

Now, therefore, the condition of this obligation is, that if the above-named Philip Phillips shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

Signed, PHILIP PHILLIPS.
W. HALLETT PHILLIPS.

Sealed and delivered in presence of—
Signed, JNO. J. BEALL.

Approved this 20th day of February, 1883, to operate as a supersedeas.

Signed, D. K. CARTTER,
Ch'f Justice.

UNITED STATES OF AMERICA, SS:

The President of the United States.

To the Chief Justice and Justices of the Supreme Court of the District of Columbia, Greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said Court before you, between Philip Phillips, plaintiff, and James S. Negley, defendant, being No. 12,890 at Law, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly,

to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the honorable Morrison R Waite, Chief Justice of the United States, this 19th day of February, in the year of our Lord 1883, and of the independence of the United States the one hundred and seventh.

R. J. MEIGS,
Clerk.

[L. S.]

DISTRICT OF COLUMBIA, TO WIT:

To James S. Negley:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the District of Columbia, wherein Phillip Phillips is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, D. K. Cartter, Chief Justice of the said Supreme Court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

Service accepted, Feb'y 19, 1883.
EDWARDS & BARNARD,
Att'ys for Deft.

Authentication of Record.

Clerk's Office, Supreme Court of the District of Columbia:

[Clerk's Certificate,]

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings and printed matter annexed to this

certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 24th day of February, 1883

R. J. MEIGS,
Clerk.

[SEAL]

By J. R. YOUNG,
Assistant Clerk.

[Justice's Certificate.]

I, David K. Cartter, Chief Justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 24th day of February, 1883:

D. K. CARTTER,
Chief Justice.

[SEAL]

[Clerk's Certificate to Justice's official character.]

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Chief Justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 24th day of February, 1883.

R. J. MEIGS,
Clerk.

[SEAL]

By J. R. YOUNG,
Assistant Clerk.

117-665

FILED
MAR 1 1886
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM.—NO. 199.

PHILLIP PHILLIPS, *Plaintiff in Error,*

vs.

JAMES S. NEGLEY, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

JOHN SELDEN,
W. HALLETT PHILLIPS,
Counsel for Plff. in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

PHILLIP PHILLIPS, *Plaintiff in Error*,

vs.

JAMES S. NEGLEY, *Defendant in Error.*

No. 199.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

Phillip Phillips sued *Negley*, below, on an order for $4,368, drawn by the latter, under the description of "*Attorney for Mrs. Witowski*," and by one *Simon Witowski*, upon *Hovey* and *Peck*, and accepted by the drawees, payable out of money to be received by them at the Treasury, on account of a judgment recovered in the Court of Claims by *Simon Witowski*, and also, for money had and received. (*Rec.*, 1–3.)

The order had been protested for non-payment, and notice had been given to the drawer. (*Id. Ib.*)

An affidavit of the plaintiff, as authorized under the local practice, was added to the declaration. (*Id.* 2.)

Negley was served with summons and with copies of the *narr.*, and rule to plead, on August 29th, 1874. (*Id.* 4.)

His appearance and defense were due, as appears from the summons, and the note at the foot thereof, on the 1st Tuesday, which was the 6th day of October following. (*Id. Ib.*)

Negley employed *Harrington* as his counsel, and furnished him with an affidavit of defense. (*Id* 12.)

This affidavit was sworn before the Clerk, on September 28. (Id. 6.)

And, on October 26, twenty days after the expiration of the time allowed for defense, was filed in the cause. (Id. 4.)

No technical or formal plea was interposed to the action.

Harrington informed his client that the proper defense had been put in, and that the plaintiff could not recover. (*Id.* 12.)

Negley, who resided in Pittsburg, received, as he asserts, no further notice or information in reference to the suit, from the fall of 1874 until 1882. (*Id. Ib.*)

On or about March 1, 1875, *Harrington* removed from *Washington*, and took up his abode at *Dover*, in the State of Delaware. (Id. 15.)

Of this he undertook to notify his clients, in general. (*Id. Ib.*)

But as no issue had been joined or action taken upon the affidavit filed for the defense, he understood, as he states, that the plaintiff had abandoned the suit, and did not notify his removal to *Negley*. (*Id. Ib.*)

On May 3, 1877, *Mattingly*, the attorney of the plaintiff, filed a joinder in issue to "*defendant's pleas*," and also a note of issue, with the clerk. (Id. 6.)

And more than ten days prior to the commencement of the May term for that year, mailed to *Harrington*, at his

address in Delaware, and, out of abundant caution, to *Negley*, at his residence in Pennsylvania, notice of the trial of the issues joined, with a copy thereof.

(*Id.* 16.)

The name and address of the sender were printed upon the envelopes containing the papers, but they were not returned to him through the postal service, as had frequently been the case with his letters, enclosed in similar envelopes, when the persons to whom they were addressed could not be found.

(*Id. Ib.*)

The cause remained upon the trial calendar of each succeeding term, until, in the course of January Term, 1879, (*Id. Ib.*), and on the 3d day of April in that year, "the defendant not appearing," there was verdict and judgment for the plaintiff, for the amount claimed in his declaration. (*Id.* 7.)

The verdict was rendered upon proof of the order sued upon, and the testimony of the plaintiff, that after he had obtained the order and passed acquittances upon the faith thereof, the defendant, with full knowledge of the facts, had "procured the fund on which the said order was drawn, to be paid into his hands, instead of the hands of the drawees and acceptors of the said order; and, in manifest disregard of his duty in the premises, wholly failed to apply the said fund to the satisfaction of the said order, or any part thereof." (*Id.*, 17.)

Upon this judgment, on or about July 26, 1882, *Negley* was sued in Pennsylvania (*Id.*, 12), and recovery, thereafter, had against him. (*Id.*, 18.)

On September 4, 1882, the defendant moved, in the Special Term and Circuit Court below, upon the affidavits of himself and *Harrington*, to vacate and set aside the original judgment and verdict, on the ground of "*irregularity, surprise, fraud and deceit*" in their procurement, "*and the negligence of defendant's attorney.*" (*Id.*, 7.)

Counter-affidavits were filed from the plaintiff and *Mattingly*. (*Id.*, 16–18.)

And upon this motion and upon these four affidavits, and upon them alone, the special term and Circuit Court, on December 2, 1882, nearly three years and eight months after the entry of the verdict and judgment, directed the vacation of both, and awarded a new trial. (*Id.*, 9–10.)

To such the action of the special term and Circuit Court, exception was duly taken by the plaintiff, (*Id. Ib.*) who, upon his bill of exception, appealed to the General Term below. (*Id.*, 19.)

Subsequently, the defendant moved the General Term, to dismiss the appeal and remand the case for trial, on the ground that no appeal lay from the order vacating the judgment and directing a trial *de novo* (*Id.*, 19.)

And, on February 19, 1883, the General Term rendered judgment to the following effect:

> "Because it appears to the Court here, that there is no error in the record and proceedings of the special term, therefore, the Court remands the case to the special term, there to be proceeded with as if no appeal had been taken from its order of December 2, 1882, which appeal is hereby dismissed with costs." (*Id.*, 20.)

The plaintiff below sued out this writ of error to reverse the judgment of the General Term.

Upon his decease, pending the writ, his personal representatives became parties, under the rule.

Assignments of Error.

1. The General Term erred in holding there was no error in the order made at the special term, on December 2d, 1882, vacating the verdict and judgment rendered on April 3, 1879.

2. The General Term erred in remanding the case to the special term, there to be proceeded with as if no appeal had been taken from the said order.

3. The General Term erred in dismissing the said appeal taken from the said order.

Points and Authorities.

By *U. S. Rev. Stat., D. C.*, the Court below may, by rule, regulate the number and duration of its terms, (*Sec.* 755), but at least three terms must be held annually. (*Sec.* 756.)

The verdict and judgment rendered on April 3, 1879, at a term commencing on the 4th Monday and 27th day of January, in that year (*Rec.* 6), were set aside, upon motion, on December 2, 1882, at a term commencing on the 3d Monday and 16th day of October, in the latter year. (*Id.* 8.)

Ten terms had succeeded the term—about *three years and eight months* had expired since the date—at which the verdict and judgment were entered.

Has the special term of the Court below, power to set aside its final judgments on mere motion and in its uncontrollable discretion, after whatever lapse of time?

I. As to jurisdiction.*

This is the question presented by the writ of error.

But we are met with the objection that this Court is without jurisdiction to determine it.

1. *As to the form of the judgment.*

It cannot be doubted, that the judgment of vacation rendered on December 2, 1882, by the Special Term, (*Rec.*, 8), as well as the judgment rendered on February 19, 1883, by the General Term, dismissing the appeal and remanding the cause, "because it appears to the Court here *that there is no error in the record and proceedings of the Special Term*," (*Id.* 19) are, in the most technical sense, judgments, in point of form, as well as in their effects.

But the rule is well settled, that any definitive sentence or decision by which the merits of a cause are determined, although it be not technically a judgment, or the proceedings be not capable of enrollment, so as to constitute what is technically called a record, is a judgment, within the meaning of the statutes regulating the appellate jurisdiction of this Court.

The question, therefore, is not to be determined by technical definitions and verbal criticism, or by the terms and phrases in which judgments have been or may be expressed.

2. *As to the finality of the judgment.*

*This branch of the argument was prepared, in the main, by the late Mr. Phillips himself.

By *Rev. Stat. D. C., Sec. 846*, the final judgments, orders or decrees of the Court below, are reviewable in this Court, in the same cases and in like manner as those of the Circuit Courts of the United States.

The words "*final judgment*," as used in the Statute, must be understood as applying to all judgments which determine the particular cause.

Weston v. *City of Charleston*, *2 Pet.*, *449*.
Holmes v. *Jennison, et al.*, *14 Id.*, *562-563*.

What was the particular cause on which the judgment in question was rendered?

In the determination of this question, it is immaterial whether the action of the Court below was founded on motion and affidavits, or upon formal application, by Petition or Bill.

It is the *judgment* we are dealing with, and not the form of proceeding on which it was rendered.

The only purpose of the motion was to set aside the verdict and judgment rendered in 1879.

Whether the Court below had *authority* to direct this vacation, constituted the only controversy upon the motion

On this particular cause the Court below acted. And its decision, determining that cause, is a final judgment, subject to the appellate power of this Court.

It is true, that the Special Term, on granting the motion, awarded a new trial. But this was not requested in the motion itself.

And had the Special Term merely vacated the verdict and original judgment, the finality of the judgment of vacation could not, it is supposed, be disputed.

Is the judgment of vacation less final because it awards a *venire de novo?*

The destruction of the plaintiff's right of property in the verdict and judgment, was all that was sought to be effected by the defendant, or resisted by the plaintiff, upon the motion. And the power exercised by the Court below, in accomplishing such destruction, is all that is brought up by the writ for review.

The class of decisions in which it has been held, that the granting of a new trial was not a final judgment, within the meaning of the statute, has reference to such new trials as are ordered in the regular progress of the cause, and where the movement for the new trial is begun during the term at which the judgment was rendered. Such are the cases referred to in

Parcels v. *Johnson*, 20 *Wall.*, 653;

And those collected in the brief of defendant in error, p. 5.

The case before us falls within a different category.

The decision complained of, not only subjects the party to delay, but, by destroying the original judgment, may render any subsequent recovery, either here or in the State of Pennsylvania, entirely worthless.

The important right of property created by the original judgment cannot, on any principle of law, rest in the *uncontrolled discretion of the judges.*

The Court of Appeals of Maryland, in reversing an order vacating a judgment, as not within the rule of equitable interference, say: "By means of the judgment new rights are acquired, and, if stricken out, other claims may intervene, and the plaintiff may not only lose *his lien*, but, in many cases, the entire debt."

Abel v. *Simon*, 19 *Md.*, 423.

"The question relates to the *power* of the court, and not to the mode of procedure. It is whether there exists in the Court the authority to set aside, vacate, and modify its final judgments, after the term at which they were rendered."

Bronson v. *Schulten*, 104, *U. S.*, 410.

The decision of such a question is necessarily subject to the appellate jurisdiction.

The law is thus stated in *Freeman on Judgments*, § 18:

"When, in an action to set aside a judgment, the court grants the prayer and awards a new trial, the order setting aside the judgment, is a *final judgment*, and, as such, may be appealed from.

The whole scope and object of the suit being to vacate the former judgment and to procure a new trial, and the issues being made for that purpose, their determination necessarily *puts an end to the suit.*"

This is fully sustained by the Supreme Courts of California and Kentucky, where the precise question now discussed was presented for adjudication.

Belt v. *Davis*, 1 Cal., 134;

McCall v. *Hitchcock*, 7 Bush, 616.

And, in Maryland, such orders were always freely subject to the appellate jurisdiction. (Post, pp. 43–44.)

The pending writ of error presents the question determined by the order below, in as final a form, as, in the regular course of judicial proceedings, that question can ever, in the particular suit, be brought before this Court.

Had the plaintiff submitted, in the Court below, to its order, and, upon a second trial, recovered judgment, *de novo* the validity of the order must have ceased to be questionable.

And though, before the late increase in the jurisdictional value, on error to the Court below, the plaintiff, if defeated upon the second trial, might, by writ of error to the ultimate judgment, have brought before this Court for review, the order vacating the original judgment, yet the validity of that order could not have been re-agitated in the Court below, and the order itself, upon the question now presented for decision, must have there stood as final and conclusive *before* the new trial, as it could have remained at any time afterwards.

The error of the opposing argument, consists in confounding the finality of the order upon the merits of the original cause of action asserted by the plaintiff, with the finality of the order upon the question of the power to vacate an existing verdict and judgment, upon motion, after the expiration of the term.

The latter question only was involved in the motion, or is now presented here.

The former, as we contend, was properly concluded by the original judgment. It was, at least, left *unconcluded* by the order passed upon the motion.

In *Harris* v. *Hardeman et al.*, 14 *How.*, 334, this Court took jurisdiction and *affirmed* the judgment of the Circuit Court vacating its former judgment, on motion, after the expiration of the term, though, as will be more fully explained hereafter, the power of the Circuit Court so to vacate its judgment, was rested by this Court upon the particular state of the proceedings, at the time of the motion, and upon the actual nullity of the judgment vacated. (*Post* pp. 18–19.)

The power of the court over its own judgments, can, in general, be no more absolute, when the court is sitting as a common law tribunal, than when proceeding in equity, upon what is known as a bill for a new trial. (See 2 *Story Eq. Jur.*, § 887.)

Yet, in the latter case, an appeal lies to this Court, equally whether by the decree below the bill be dismissed or sustained upon the merits.

In *Crim* v. *Handley*, 104 *U. S.*, 652, on a "bill for an injunction *and a new trial*," the Circuit Court decreed *against* the bill, and the decree, on appeal, was affirmed.

In *Kibbe* v. *Benson*, 17 *Wall.*, 624, the Circuit Court sustained the bill and decreed, that "the judgment at law should be *vacated* and set aside, the cause reinstated upon the docket, and be tried as though no former trial had been had therein." (*p.* 627.)

This decree was affirmed, on appeal, after full consideration of the evidence contained in the record.

This Court there said: "The question of jurisdiction is identical with the question of the merits. If the party has established the facts on which he relies to sustain his action, he comes within the rules governing relief in equity against judgments at law. If he is not one of the class entitled to such relief in equity against judgments at law, he has no

standing in a court of equity. A determination of the allegations of facts upon which the jurisdiction rests will, therefore, determine the entire case." (*Id.*, p. 628.)

This court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, the bill is not to be considered as original, but as a continuation of the proceeding at law; "so much so, that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another State, if he were a party to the judgment at law." *Minnesota Co.* v. *St. Paul Co.*, 2 *Wall.*, 633.

If a *decree*, on the Equity side of the Court, vacating a judgment, upon a bill filed in continuation of the proceedings at law, be deemed a *final* decree, an *order*, passed on the law side of the same Court, vacating its judgment, upon motion, after the term, ought also to be considered final, so long as relief against the judgment, in which ever tribunal administered, is admitted to be governed by the same principles.

II. *As to the correctness of the decision below.*

It is shown by the decisions of this Court,—

1. That though the "control of the Court over its own judgment *during the term*, is of every-day practice,"—

Bassett v. *U. S.*, 9 *Wall.*, 41;
Cheang-Kee v. *U. S.*, 3 *Id.*, 320;
Ex parte Lange, 18 *Id.*, 167—

That, during the term, the judgment remains "in the breast of the Court,"—

Ayres v. *Wiswall*, 112 *U. S.*, 190;
Doss et al. v. *Tyack*, 14 *How.*, 312;
Goddard v. *Ordway*, 101 *U. S.*, 752—

Here, as elsewhere,—

U. S. v. *White*, 23 *How.*, 255;
U. S. v. *Knight's Admr.*, 1 *Black.*, 490;
U. S. v. *Alire*, 6 *Wall.*, 577;
Maguire v. *Tyler*, 8 *Id.*, 672;
State of Florida v. *Anderson, et al.* 91 *U. S.*, 687—

And that a motion or petition filed *during the term*, if entertained by the Court, may suspend the operation of a judgment or decree,—

Brockett vs. *Brockett*, 2 *How.*, 238;
Cambuston vs. *U. S.*, 95 *U. S.*, 287—

And authorize the vacation of the judgment or decree at another term.—

Goddard v. *Ordway*, 101 *U. S.*, 751;
Loring v. *Frue*, 104 *Id.*, 224;—

---

2. That though the Court possesses full power, *after the expiration of the term*, to correct all errors or misprisions of the clerk,—

Bank U. S. vs. *Moss*, 6 *How.* 38;
Sheppard et al v. *Wilson*, 6 *Id.*, 277;
Supervisors v. *Durant*, 9 *Wall.*, 736;
Gunn v. *Plant*, 94 *U. S.*, 671;—

And to amend formal defects in the pleadings or process,—

Waldon v. *Craig*, 9 *Wheat.*, 566;
Jackson et al v. *Ashton*, 10 *Pet.*, 480;
Lessees of Walden v. *Craig's Heirs*, 14 *Pet.*, 153–154;
Matthewson's Adm's v. *Grant's Adm's*, 2 *How.*, 280;
Garland v. *Davis*, 3 *How.*, 131;
Williams v. *Gibbes et al.*, 20 *Id.*, 541;
Supervisors v. *Durant*, 9 *Wall.*, 737;
Slicer et al v. *Bank, &c.*, 16 *How.*, 571;
Cook v. *Burnley*, 11 *Wall.*, 676;
Phillips v. *Moore*, 100 *U. S.*, 212;—

And that *here*, as elsewhere, there exists like power of correction,—

The Palmyra, 1 *Wheat.*, 10;
Bank of Kentucky v. *Wistar et al.*, 3 *Pet.*, 431;
Ex parte Crenshaw, 15 *Id.*, 119–123;
Alviso v. *U. S.*, 6 *Wall.*, 457;
Schell v. *Dodge*, 107 *U. S.*, 630;—

And like power of amending its writs of error, as well *without* the act of June 1, 1872,—

Woodward v. *Brown et ux*, 13 *Pet.*, 1;
McVeigh v. *U. S.*, 8 *Wall.*, 640;
As *under* that enactment. *Hampton* v. *Rouse*, 15 *Wall.*, 684;

And its reenactment in *Rev. Stat. U. S., Sec.* 1005.
National Bank v. *Bank of Commerce*, 99 *U. S.*, 609;
Tex. & Pacif. R. R. Co. v. *Kirk*, 111 *Id.*, 486;

3. Yet that, as early as Feb. T., 1818, the Circuit Court of Kentucky, sitting in equity, certified to *this* Court the question, "Has the Circuit Court power and jurisdiction over a a judgment or decree, so as to set the same aside after the term

at which it was pronounced?" and received for answer, "that, in this case, the Court has not power over its decree, so as to set the same aside, on motion, after the expiration of the term in which it was rendered."

Cameron v. *McRoberts*, 3 *Wheat.*, 591.

4. That "no principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of law or fact, after the term in which they have been rendered, unless for clerical mistakes."

Ex parte Sibbald v. *U. S.*, 12 *Pet.*, 492; *S. C.*, 2 *How.*, 455;
Jackson et al. v. *Ashton*, 10 *Pet.*, 480;
Wash'n Bridge Co. v. *Stewart et al.*, 3 *How.*, 424;
Bank U. S. v. *Moss et al.*, 6 *Id.*, 38;
Rice v. *Minn. & N. W. R. R. Co.*, 21 *Id.*, 84;
Tyler v. *Maguire*, 17 *Wall.*, 283;
Muller et al. v. *Ehlers*, 91 *U. S.*, 250;
Cambuston v. *U. S.*, 95 *Id.*, 287;
Schell v. *Dodge*, 107 *Id.*, 630;
Bronson v. *Schulten*, 104 *U. S.*, 415.

That "so strongly has this principle been upheld by this Court, that, while realizing that there is no court which can review its decisions, it has invariably refused an application for rehearing made after the adjournment of the Court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the Court."

Bronson v. *Schulten*, 104 U. S., 415;
Acc. *Hadson et al.* v. *Guestier*, 7 Cranch., 1;
Browder v. *McArthur*, 7 Wheat., 58;
Peck et al. v *Sanderson*, 18 How., 42;
Tyler v. *Maguire*, 17 Wall., 283;
Brooks v. *Railroad Company*, 102 U. S., 107.

The only conceded exceptions are those of fraud,
U. S. v. *Gomez*, 23 How., 326; S. C. 1 Wall., 690, 752,
And collusion, *Cochrane* v. *Deener*, 95 U. S., 355.

5. Finally, that a Circuit Court of the United States has no power, without the aid of Congress, to set aside its valid judgment, upon motion of a party thereto, after the expiration of the term, and can acquire none under the statutes or judicial decisions of the State wherein the court may be held.
Bronson v. *Schulten*, 104 U. S., 417.

It is held, however, in effect, by the Supreme Court of the District of Columbia, that every tribunal of the United States, may, at discretion, and upon mere motion, set aside its final judgments, without regard either to terms of court or the lapse of years.

The opinion below refers to the case of *Bronson* v. *Schulten*, thus:

"The decision of the Court, reversing the order below, was placed solely upon the ground of the gross laches of the plaintiffs and their acquiesence during seventeen years," &c. 2 Mackey, 248.

"So far from deciding the principle contended for, it may well be invoked as an authority in support of that jurisdiction." *Id. Ib.*

And the "wholesome jurisdiction" exercised by the Court below, "must exist," it is said, "in every court of record, as an inherent power, indispensable to prevent a failure of justice and the abuse and perversion of its judgments or unjust ends. And we can see no good reason why the

courts of the United States should be so grievously enfeebled for good, as they would be, if this power was denied them." *Id.* 249.

The position assumed in the opinion below is there supposed to be supported by the rulings of this Court "as far back as 1824" *Id* 248.

The cases cited for such support, are the following:

(*a.*) *Walden* v. *Craig*, 9 *Wheat.*, 576, where it was held, that error would not lie upon the allowance of a motion to extend, by amendment, the term of the demise laid in a declaration in ejectment, for the motion was collateral and might be renewed.

(*b.*) *Boyle* v. *Zacharie*, 6 *Pet.*, 648, where it was held that error would not lie upon a refusal to quash a *venditioni exponas*, the refusal being merely an interlocutory order, and not a final judgment.

(*c.*) *Pickett's Heirs* v. *Legerwood et al.*, 7 *Pet.*, 144.

There, the term of the demise laid in a declaration in ejectment had expired nearly twenty-five years before, and without notice to the terre-tenants, the court below, "*unaware of these facts*," had allowed a motion to extend the term, by amendment, so as to enable the plaintiffs to sue out for the first time, *habere facias* upon a judgment of thirty-three years standing. The terre-tenants, at a subsequent term of the Court, brought their writ of error *coram vobis*, to reverse the order allowing the amendment, and to quash the *habere facias*, and the court below reversed the order and quashed the execution, and, thereupon, the plaintiff in the ejectment sued out a writ of error from *this* court, where it was *held*, that

the writ of error *coram vobis* was but a substitute, in the court below, for a motion, and that the case fell within the rule of *Wabden* v. *Craig*, *supra*, exempting the decision upon such motions from review, by writ of error from this court.

This case, like the two decisions which preceded it, turned upon the finality of the judgment. *U. S.* v. *Abatoir Place*, 106 *U. S.*, 162.

But it is not, as has been sometimes supposed, authority for the position that a writ of error will, *in no case*, lie upon the order or judgment rendered upon a writ of error *coram vobis*. It will not, indeed, lie, where, as happened in the case from 7th Pet. the judgment upon the writ of error *coram vobis* is rendered *upon matter of fact*. But where the court below, upon a writ of error *coram vobis*, decides that a particular matter of fact, *e. g.* the appearance by attorney of an infant,—is no ground for disturbing the judgment, that which was primarily error of fact in that court, becomes, by its decision, error of law and subject to review, above

The Elmira, 16 *Fed. Rep.*, 138–139, and English cases there examined;
Davis v. *Packard et al.*, 7 *Pet.*, 282;
S. C. 8 *Id.*, 324.

It is to be observed that in the case from 7*th Pet.*, the order and *habere facias* were *void*, as to the terre tenants, for want of notice.

Jackson v. *Bank U. S.*, 5 *Cranch, C. C.*, 1.

And the case receives illustration from—

(*d.*) *Harris* v. *Hardeman et als*, 14 *How.*, 334, also cited in the opinion below, and arising and determined thus:

Upon *a void return* of process, by the marshal, there was judgment, in 1839, by default, against the defendant, who,

after *fi. fa.*, levied upon certain slaves, gave a forthcoming bond, which, under the State law, was part of the process of execution. In 1840, without the order of the court, another *fi. fa.* was sued out, but with stay of execution endorsed thereon. In 1850, and during the stay, the defendant moved to set aside the judgment and to quash the forthcoming bond, on the ground of the *nullity* of the judgment, for want of service of process. And the motion was granted. This Court affirmed the action of the court below, on the ground assumed in the motion, holding, also, that the judgment was unsatisfied and in process of execution, when the motion was made, that the forthcoming bond was part of the process of execution, and that as the proceedings, being still *in fieri*, might be corrected by writ of error *coram vobis*, or by *audita querela*, they might also, under modern practice, be corrected by motion.

This decision is rested in *Thompson* vs. *Whitman*, 18 *Wall.*, 466, on the ground that a judgment may always be attacked, in a collateral proceeding, by showing that the court had no jurisdiction to pronounce it.

And is cited elsewhere, to show the distinction between *void* and merely *erroneous* judgments.

Habick v. *Folger*, 20 *Wall.*, 7.

"The judgment, if void when rendered, will always remain so."

Pennoyer v. *Neff*, 95 *U. S.*, 728;
Montgomery v. *Samory*, 97 *Id.*, 488;
U. S. v. *Walker*, 109 *U. S.*, 258.

And the refusal or allowance of a motion to quash a forthcoming bond—the bond being part of the process of *execution* and not of the judgment—has never been reviewable on error in this Court.

Amis v. *Smith*, 16 *Pet.*, 314.

It is claimed in the opinion, that the inferior tribunals of the United States have, in fact, *exercised* the power of setting aside their judgments, on motion, after the expiration of the term.

2 *Mackey*, 248.

For this are cited several cases.

Thus:

(*a.*) *Sheepshanks* v. *Bower*, Baldw., 462, where judgment by default was set aside at a subsequent term, upon proof that *the clerk*, though directed, had omitted, to enter the appearance of the attorney of the defendant, a *misprision*, we submit, which clearly distinguishes that case from *Scott* v. *Blaine*, *Baldw.*, 288.

(*b.*) *Den ex dem.*, &c., v. *McAllister*, 4 *Wash. C. C.*, 394, where, in 1823, upon petition, supported by affidavits, and filed "a few days after the adjournment of the court," judgment by default against the *casual ejector*, for want of appearance and entry into the consent rule, was set aside. (See *post*, p. 31–32.)

Yet, in 1810, the same judge, in refusing to set aside a judgment on an award, had said, "This judgment, having been entered at a former Court, though probably improvidently done, and might have been refused had it been opposed, until the indemnity was given, cannot now be vacated. If there was error in entering it, the Court, at a subsequent term, cannot set it aside, unless it was entered by the misprision of the clerk, by fraud, or the like." *Assignees of Medford* v. *Dorsey*, 2 *Id.*, 433.

(*c.*) *Alee* v. *Johnson*, 1 *Flippin*, 341, where, in 1874, because the judgment, being against a *feme covert*, was *void*, it was set aside at a subsequent term, under the authority of *Harris* v. *Hardeman et al.* (*sup.*)

(*d.*) And *Dawson* v. *Daniel*, 2 *Flippin*, 301-302, where the opinion opens thus: "This is a motion to set aside a

judgment by default, taken last term, *but continued over by this motion till now.*"

In 1884, *Brown, J.*, adverting to *Bronson* v. *Schulten*, as holding "that there was no power to set aside, vacate, or modify a judgment after the lapse of the term," adds, "the decisions of the Circuits are, we believe, *without exception*, to the same effect."

Allen v. *Wilson*, 21 *Fed. Rep.*, 884.
See also *U. S.* v. *Walsh*. 22 *Id.*, 648.

It is held in the opinion below "to be perfectly clear that this Court derived from the Maryland law, if it did not possess it in common with the other Courts of the United States, entire power to strike out its judgments for proper cause shown, on motion, after the expiration of the term.

That such was the practice of the Maryland courts in February, 1801, cannot be denied. The power was expressly recognized by the act of 1787, *c.* 9, *s.* 6, as one previously existing, independent of any statute, either as a common law power or as inherent in the constitution of courts of justice."

"It therefore follows, as a necessary consequence, that the same power was possessed by the first Circuit Court established in the District, in 1801, and has devolved upon its successors in turn.

There is abundant evidence at hand that it has been exercised on repeated occasions by our predecessors in this District."

2 *Mackey*, 251.

The Maryland Act of 1787, *ch.* 9, is an act relating exclusively to *continuances*.

Its sixth section is as follows:

"In any case where a judgment shall be set aside for fraud, deceit, surprise or irregularity, in obtaining the same, the said courts respectively may direct the continuances to be entered from the Court when such judgment was obtained, until the Court such judgment shall be set aside, and may also continue such cause for so long a time as they shall judge necessary for the trial of the merits between the parties, not exceeding two courts after such cause has been reinstated, unless, &c."

2 *Kilty Laws, Thomp., Dig.*, 173.

It is not suggested by the Court below, that the power in question was *conferred* upon the courts of Maryland by her Act of 1787.

The power exercised by the courts of Maryland to vacate their final judgments, on mere motion, after the expiration of any number of terms, it is conceded, both by those courts and in the opinion below, was not derived from the act, though it is held by both, that the power is therein recognized.

This power is claimed by the tribunals of that State as an equitable jurisdiction, with which they are vested, inherently, without the intervention of statute, and from the very nature of their functions.

Craig v. *Worth*, 47 *Md.*, 282–3;
Kemp, &c. v. *Cook*, 18 *Md.*, 137–138.

Nor does the act of 1787, either expressly or by necessary implication, recognize the power of the courts of Maryland, to set aside their judgments, *on motion*, after the term.

The enactment provides for the entry of continuances "where a judgment *shall be* set aside," for certain enumerated causes.

But it neither specifies nor recognizes any particular practice or mode of procedure, as appropriate to the vacation of the judgment.

An *audita querela* was a recognized remedy in Maryland, at the time of her cession to the United States. (2 *Harris Ent.*, 65.)

And in the District of Columbia, after that cession.

Jackson v. *Bank U. S.*, 5 Cranch., C. C. 7.

So, also, the writ of error *coram nobis* was known in that State, at the time of her cession.

2 *Harris Ent.*, 450, 792–793;
Hawkins v. *Bowie*, 9 *G. & J.*, 437;
Kemp, &c. v. *Cook*, 18 *Md.*, 137.

And both these proceedings were part of the common law.

Seven cases are collected in the opinion below from the period of forty years covered by Cranch's Circuit Court Reports, for the purpose of showing the repeated exercise by the Circuit Court for this District, of the power to set aside its judgments, on motion, after the expiration of the term.

(*a.*) The first is *Sherburne* v. *King, et al.*, 2 *Cr., C. C.*, 205, where an action of replevin, discontinued at the preceding term, by the non-appearance of the defendant, was re-instated at June T. 1820, "it appearing to the satisfaction of

the Court, that the appearance of the defendant by his attorney, was omitted to be entered, *by the mistake of the clerk*."

(*b.*) The second is *McCormick's Lessee* v. *Magruder*, 2 *Cranch* C. C., 228, decided at April T. 1821, where judgment by default and *habere facias* against the casual ejector, were set aside, upon motion of the tenant, at a subsequent term, upon proof that an attorney of the Court "ordered the clerk to enter his appearance for the tenant, before the judgment was entered, but the *clerk by mistake entered it in another case*."

(*c.*) The third is *Union Bank*, &c. v. *Crittenden*, 2 *Id.*, 238–239, also decided at April T. 1821, where judgment entered by default, at the previous term, was set aside, upon proof that the attorney of the defendant, before the judgment was entered, "directed the clerk to enter his appearance, which was done, *by mistake*, in one suit only, there being two between the same parties."

But, at Dec'r T. 1804, where there had been judgment of *non pros.* for want of security for costs, and "the clerk was in no default," the Court refused to set aside the judgment, at the next term, on motion.

Lindsay v. *Twining*, 1 *Cr., C. C.*, 206.

So, at Dec. T., 1813, the Court refused to reinstate an action of replevin, which had been discontinued a year before by reason of the non-appearance of the plaintiff.

Nicholls v *Hazen*, 2 *Cr. C. C.*, 95.

And though, between the years 1802 and 1822, cases are to be found where the defaults or misprisions *of the clerk*,

were corrected by setting aside the judgment, on motion, after the expiration of the term—

U. S. v. *McKnight*, 1 *Id.*, 84;
U. S. v. *Smith*, *Id.*, 127;
Pierce v. *Turner*, *Id.*, 433, 434;
McCleod v. *Gloyd*, 2 *Id.*, 264;

Yet, at April T., 1823, the court refused to open its judgment, after the expiration of the term, for the purpose of including in the taxation of costs an item that had been omitted therefrom.

Blagrove v. *Ringold*, 2 *Cr. C. C.*, 407.

And, at the same time, upon a motion to reinstate a cause, discontinued for non-appearance, at the preceding term, declared "that the only cases in which they had granted such a request were those in which it appeared to be the default *of the clerk* that the appearance had not been entered."

Williamson v. *Bryan*, 2 *Id.*, 407.

The same language, in substance, was employed at Jan. T., 1825.

French v. *Venable*, *Id.*, 509, 510.

(*d*) A fourth case cited in the opinion below, is that of *Reiling* vs. *Bolier*, 3 *Cranch C. C.*, 212, 213, decided at Dec. T., 1827, where the motion was to set aside "an *interlocutory* judgment by default and quash the writ of inquiry" awarded at the preceding term, upon the terms of pleading *instanter*, trial, and payment of costs.

"The *Court*, (*Morsell*, J., doubting), after examining the decisions of this Court, and not finding any directly to the point, where the judgment was interlocutory and writ of inquiry warded, granted the prayer of the defendants' counsel, on

the terms offered. This would have been the regular trial term if the pleas had been regularly filed."

The distinction between *interlocutory* and *final* judgments, by default, is elementary.

3 *Bl. Com.*, 397, 398;

Clements v. *Berry*, 11 *How.*, 409.

And as long as the judgment is not *final*, it is liable to be vacated, on motion.

Mechanics' Bank of Alexandria v. *Withers*, 6 *Wheat.*, 107.

(*c.*) The opinion below refers also to *Ault* v. *Elliott*, 2 *Cranch C. C.* 372, where *the special bail*, upon the return of *scire facias* against him, having, at April T., 1823, obtained a rule upon the plaintiff to show cause why the original judgment,—which, though entered, by confession, in December, 1819, had been rendered *without any declaration* or rule either to declare or plead,—should not be vacated, for irregularity, and the proceeding on *sci. fa.* quashed, the rule, on June 22, 1824,* having been made absolute, the judgment and proceeding were set aside

This decision rests, however, upon grounds peculiar to proceedings against *bail*, and other sureties, and cannot be made applicable to proceedings between the immediate parties to the judgment.

Proceedings against bail were subject, in great degree, to the regulation and practice of the court in which those proceedings were conducted.

Beers v. *Haughton, et al.* 9, *Pet.* 358.

*This, *semble*, should be 1823. The decision was cited, in argument, at April T., 1824, in support of the motion allowed in *Ringold* v. *Elliott*, *infra*, p. 28.

Under the Maryland practice, a judgment, though rendered *upon confession*, might always be reversed, for irregularity, on error by the defendant, when no declaration had been filed.

Hardy v. *Moore's Exor*, 3 *Har. & McH*, 389. (*an.* 1795;)
Bowie v. *The State*, Id. 408. (*an.* 1796.)

But, as the bail was no party to the judgment, he could have no writ of error or appeal to reverse it.

Neither in the collateral action by *scire facias*, could the bail formally *plead* any irregularity in the proceedings upon which the original judgment was founded.

And, in view of this inability, and, because he might still be injuriously affected by such irregularity, the bail was permitted to avail himself of the irregularity, by *motion*, in a summary manner.

Hayward v. *Ribbans*, 4 *East.*, 313;
1 *Chitty Pl.* 469 (13th, Am. ed.)
2 *Tidd Pr.* 1129 (3rd, am. ed.)
Petersdorff on Bail, 418–419.
Beers v. *Haughton, et al.* 9 *Pet.*, 358;
Morsell v. *Hall*, 13 *How.*, 215.

But the motion was addressed to the discretion of the Court, and its decision could not be reviewed, on error.

Morsell v. *Hall*, 13 *How.*, 215;
U. S. v. *Abatoir Place*, 106 *U. S.*

That the motion *by the bail*, for relief against the original judgment, was made after the expiration of the term at which such judgment was rendered, does not affect the question presented by the record before us.

As the bail became *ipso facto* discharged, if the principal surrendered himself on the return day of the *scire facias*,

(3 *Bl. Com.*, 416–417), a motion by the bail, for relief from the judgment, could rarely, if ever, become necessary, until the return day of the *scire facias*.

And such motion by the bail, if made after the return of the *scire facias*, must also, and inevitably, be made after the expiration of the term at which the original judgment was rendered.

For the judgment must precede execution, no *scire facias* could issue against the bail, until after *ca. sa.* had been returned *non est* against the principal (3 *Bl. Com.*, 416–417), and the *ca. sa.* and the *sci. fa.* were returnable to different terms of the Court. (*Bowyer* vs. *Herty*, 1 *Cr. C. C.*, 251.)

(*f.*) Closely resembling the case next above cited from the opinion below, is that of *Ringold* v. *Elliott*, 2 *Cr. C. C.*, 462, where, in June, 1824, on motion made at April T. in that year, by the defendant in a suit upon a bond executed by him, as surety, in an action of replevin, wherein there had been verdict and judgment for the defendant in replevin, in 1823, the verdict and judgment were set aside, for the *want of a declaration*, in the replevin.

This last case may be explained, partly upon the authority of *Ault* vs. *Elliott*, and partly, upon the very liberal principles adopted in Maryland, in favor of the surety, (*Drummond* v *Prestman*, 12 *Wheat.*, 522–523), at a period when the precise legal effect upon him, of a judgment recovered against his principal, was, as it long continued to remain, not well settled, in America. (7 *Robinson's Pract.*, 142, 144.)

(*g.*) The opinion below also cites, *Baker and Dyer* v. *Glover*, 2 *Cranch, C. C.*, 682, decided at May T., 1826, where, upon a bill filed by *garnishees* to restrain execution upon a judgment of condemnation recovered against them, at June term, 1818, by default and surprise, it having been contended

for the defendant to the bill, that an injunction would not lie "to stay execution upon a judgment by default," and that as "the complainant had a complete remedy at law, under the Maryland act of 1787, *c.* 9, § 6, by a motion to set aside the judgment for suprise or regularity, and to quash the execution," "there was no equity in the bill,"—the garnishees moved that the judgment be in fact set aside and the execution quashed, "the Court ordered the injunction and the motion to set aside the judgment and quash the execution, to be *continued* till the final hearing upon the case in equity."

But this decision neither asserted nor recognized the power of the court to set aside its judgment, upon the motion made for that purpose.

The allowance of the injunction, might fairly be claimed to imply the dissent of the court from the contention, that a complete remedy against the judgment might be afforded, by motion, under the act of Maryland, since, as was properly assumed in the argument, the existence of a plain, adequate and complete remedy at law, must, in itself, have been fatal to relief in equity, by injunction.

But certain it is, that the reported cases in *this* Court fail to show that relief has ever been sought after the term against the judgment of a local court of the District of Columbia, by a party to the judgment, except by bill in equity.

Such relief was so sought against the judgments of the Circuit Court of that District, in

Marine Ins. Co. v. *Hodgson*, 7 *Cranch.*, 336;
Lenox v. *Prout*, 3 *Wheat.*, 520;
Leeds v. *Mar. Ins. Co.*, 6 *Id.*, 565;
Union Bk., &c., v. *Geary*, 5 *Pet.*, 99;
Brown v. *Swann*, 8 *Id.*, 1;
Mixdorff v. *Smith*, 16 *Id.*, 132.

And, at Oct. T. 1873, against a judgment of the Supreme Court of that District,—

Willett v. *Fister*, 18 *Wall.*, 91.

The same relief was sought against a judgment of the Circuit Court for the State of Maryland, in

Bayle v. *Zacharie*, 6 *Pet.*, 635.

And this mode of relief was admitted to be proper in

Fenwick v. *Chapman*, 9 *Id.*, 479.

No proceeding by a party to any final judgment of the Circuit or Supreme Court of the District of Columbia, or of the Circuit Court for the State of Maryland, to vacate the judgment, upon motion, after the expiration of the term, appears in the reports of this court from the 1st of Cranch, to 114 U. S., both inclusive.

Connor v. *Pough's Lessee*, 18 *How.*, 395, furnishes no exception.

There was sued out a *writ of error*, upon an *appeal* taken by the *tenant* from the refusal of the Circuit Court for this District, at Oct. T. 1855, to set aside, upon motion made in June, 1855, a judgment recovered by default *against the casual ejector*, (as stated by this Court, and not against the *tenant* also, as erroneously supposed by the Reporter,) at Oct. T. 1854—to quash an *alias habere facias* returnable to Oct. T. 1855—and to permit the tenant to intervene and defend.

5/

The writ of error was dismissed. This Court said: "No one but a party to a suit can bring a writ of error. The tenant having neglected to have herself made such, cannot have a writ of error to the judgment *against the casual ejector*."

It is true, it was added: "The motion afterwards made to have the judgment set aside and for leave to intervene, was an application to the sound discretion of the court."

But this language is to be applied to the circumstances of the case in which it occurred.

The application of the tenant for leave to appear and defend, in ejectment, was, in its origin, addressed to the discretion of the court. (3 *Bl. Com.*, 203.)

And as the *alias hab. fac.* was not returnable, when the motion was made, the proceedings, as in the case of *Harris* v. *Hardeman*, were still *in fieri*.

Reference has already been made to the grounds upon which the *bail* was permitted to avail himself, by motion, of irregularity in the proceedings terminating in judgment against his principal.

And it was early established in the common law, that though parties and privies, who might have a writ of error or remedy by attaint, must pursue such methods of relief, yet strangers to the judgment might attack it, collaterally, for irregularity. (3 *Reeve's Hist*, 520–521.

There were "motions and rules peculiar to the action of *ejectment*." 1 *Tidd Pr.*, 489. (*3rd Am. ed.*)

"The court would set aside a default to protect the possession of the tenant, in an action of ejectment, when they would not do it in any other action."

Thomas v. *Croswell*, 4 *Johns. R.*, 490;
Jackson &c. v *Stiles*, 1 *Caines*, 503.

And a judgment, by default, against *the casual ejector*, might always be vacated, in the discretion of the court, at the instance of the *tenant*, notwithstanding the expiration of the term at which such judgment was rendered. *Tilling. Adam's Eject.* 225, (ed. 1830.)

1 *Tidd., Pr.* 489–490, 2 *Id.*, 1224–1225, (3rd. *Am. ed.*)

In *Maryland*, an order so vacating such a judgment, was *so* discretionary, as well as interlocutory, in its nature, that no appeal would lie therefrom.

Gover et al. v. *Cooley*, 1 *Har. & G.*, 7.

No proceeding so to vacate any final judgment of the Circuit Court for that State, is to be found in any report of that court.

No proceeding, by a party to any final judgment of the Circuit Court for this District, to vacate such judgment, on motion, after the expiration of the term,—except in the instances already particularly examined—appears in any reported decision of that court

---

No reported case is to be found, prior to that presented upon the present writ of error, in which the Supreme Court of this District has exercised, or claimed, the power so to vacate its judgment, upon such a proceeding.

"The absence of any such proceeding for so many years, is the strongest evidence of the construction put upon the law, and of the opinion entertained by the bar of the State"—as well as of the District of Columbia.

Van Ness v. *Van Ness*, 6 *How.*, 69;

See *U. S.* v. *Lee*, 106 *U. S.*, 216.

The force of the argument is not weakened by the circumstance, that a judgment upon a motion addressed to the discretion of the court below, *would not be reviewable*, in this Court, on error.

For though writs of error to the Circuit or Supreme Court of the District of Columbia, as well as to the Circuit Court for the State of Maryland, have been here dismissed, on account of the discretionary or interlocutory nature of the judgments, in none of those cases has the question, now presented, crept into the record, or been agitated in the opinion, notwithstanding, that, under the local practice of Maryland, an order vacating a final judgment and awarding a new trial, upon motion, after the expiration of the term, was freely subject to review, as matter of right.

State v. *Cox*, 2 *H. & G.*, 382;
Munnukyson v. *Dorsett*, *Id.*, 379.

See the cases from that State cited, *Post*, pp. 43–44, and in her Reports, *passim*.

Attention is requested, in the Brief for the defendant in error, to certain of the *Rules* of the court below.

But those rules form no part of the bill of exceptions and cannot here be judicially noticed.

Packet Company v. *Sickles*, 19 *Wall.*, 615.

Were it otherwise, they would be found to contain no warrant in fact, even if they could afford any in law,—for the order of the court below, vacating the verdict and judgment, upon motion, after so great a lapse of time.

Nor was the correctness of the order attempted to be sus-

tained or illustrated by the court below, by reference to any practice or authority derived from its Rules.

The 60th Rule of that court, cited in the Brief of the defendant in error (p. 6), was noticed in the opinion below, but only in connection with the classification of such motions as were *addressed to the discretion of the trial justice*, and were not, therefore, subject to review, on appeal.

It was, indeed, said, "Although the rule was designed especially to apply to motions *made shortly after the trial*, the order before us would seem to be properly within its sensible provisions." (*Id.*, p. 18.)

Upon *this*, however, very opposite conclusions might have been drawn, with mutual deference, by different minds.

For the motion for a new trial, made *below*, was not made until about three years and five months after the verdict and judgment. And it was, as well before as at the time of that motion,—and has since continued to be—expressly provided, by Rule 61 of that court, that, "ALL motions for new trial must be made *within four days after verdict*."

And by Rule 72, judgment *by default*, for want of appearance and plea, might be vacated, upon conditions, during the continuance of the appearance term, "or within the first four days of the next trial term," which would be the *quarto die post*, at common law. (3 *Bl. Com.*, 278.)

The reported decisions of the *Circuit Court* for this District, show, that the *only* form of application for relief, in practice known to that Court, against a judgment, by a party thereto, after the expiration of the term, was by bill in equity, for injunction.

No exception whatever—except as already particularly explained—anywhere appears in those decisions.

And this, whether that Court sat at *Washington*,

Prout et al. v. *Gibson, &c.*, 1 *Cr. C. C.*, 389 (*Dec. T.*, 1806);
Smith v. *Crease's Ex'ors*, 2 *Id.*, 481;
Baker v. *Dyer*, *Id.*, 682;
Kidwell v. *Masterson*, 3 *Id.*, 52;
Garey's Ex'or v. *Union Bank, &c.*, *Id.*, 233;
Mason v. *Muncaster*, *Id.*, 403;
Boone et al. v. *Small et al.*, *Id.*, 628;
Breckenridge v. *Peters' Ex'or*, 4 *Id.*, 15;
Ashton v. *McKim*, *Id.*, 19;
Smith v. *Bank, &c.*, *Id.*, 143;
Jackson v. *Bank U. S.*, 5 *Id.*, 1;
Dorsett v. *Marshall*, *Id.*, 98;
Roach v. *Hulings*, *Id.*, 637 (*March T.*, 1840);

Or at *Alexandria*.

Watson v. *Summers*, 1 *Id.*, 200 (*Nov. T.*, 1804);
Chapman et al. v. *Scott*, *Id.*, 302;
Wilson's Adm'r v. *Bastable*, *Id.*, 394;
Grundy v. *Young*, *Id.*, 443;
Fairfax v. *Hopkins*, 2 *Id.*, 134.

So extensive—and, it would seem, oppressive—within scarcely more than a single decade, had become the resort in this District to injunction, for relief against judgments at law, that Congress found it necessary to provide, by act of June 24, 1812, § 7 (2 *Stat.*, 756), that, upon the dissolution, in part or in whole, of any injunction to stay proceedings upon a pecuniary judgment rendered in this District, damages upon the sum that appeared to be due, at the rate of ten per centum per annum, from the time of the awarding until the dissolution of the injunction, should be adjudged, with costs, and that such damages and costs might

be collected by execution issued directly upon the judgment sought to be enjoined.

This enactment is retained, in substance, in *U. S. Rev. Stat. D. C., sec.* 830.

And by Act of Cong., Feb. 22, 1867, *Sec.* 4, (14 *Stat.*, 403,) still retained in U. S. Rev. Stat., D. C., *Sec.* 850, it is provided: "There shall be no supersedeas or stay of execution of the judgments of the Supreme Court of the District, otherwise than by injunction, or upon proceedings in error to the Supreme Court of the United States."

If the relief granted by motion, in the courts of Maryland, against a judgment, after the expiration of the term, could be regarded as mere matter of *practice*, the adoption of that practice was in no sense obligatory upon the Circuit Court either in this District or for that State.

By act Cong. March 2, 1793, Sec. 7 (1 Stat., 335), the courts of the United States were empowered to regulate their own practice.

By act Cong. February 27, 1801, Sec. 1 (2 *Stat.*, 105), the powers vested in the Circuit Courts of the United States, in general, were vested in Circuit Court for the District of Columbia.

It is true, that by section 34 of the Judiciary Act of 1789, the laws of the several States, in cases where they applied, and except where the laws, treaties or Constitution of the United States might otherwise require or provide, were rendered rules of decision, in the courts of the United States in trials at common law.

And by Act Cong. February 27, 1801, Sec. 1, the laws o the State of Maryland as they then existed, were retained in the District of Columbia.

But no law of a State authorizing the vacation of a judgment, on motion, after the lapse of whatever length of time was made a rule of decision in any Federal tribunal, by reason of the 34th section of the Judiciary Act of 1789.

Bronson v. *Schulten*, 104 *U. S.*, 417.

And, as the power claimed and exercised by the Maryland tribunals so to vacate their final judgments, was in nowise founded upon the statutes of that State, nor derived from the common law, that power was not communicated to the Circuit Court for the District of Columbia, merely by the legislative retention in that District of the laws of that State.

That the local practice in Maryland of vacating a final judgment and awarding a new trial, on motion, after the lapse of whatever number of terms, could not be easily adopted in the Circuit Court either for the District of Columbia or for that State, could scarcely have failed to be perceived, from the differences established by law in the State and Federal systems of remedial justice.

In Maryland, as in other of the States, the remedy by motion had superseded, in practice, the resort to *audita querela* or writ of error *coram vobis*.

An *audita querela* was, indeed, a regular suit in which the parties might plead and take issue on the merits.

Avery v. *U. S.*, 12 *Wall.*, 307.

And the judgment thereon was a final judgment, reviewable on writ of error.

New Orleans v. *Morgan*, 10 *Wall.*, 256;
Avery v. *U. S.*, 12 *Id.*, 304.

So, also, the judgment upon a writ of error *coram nobis* or *coram vobis*, might, as we have seen, be reviewed, in like manner, except as to matter of fact.

But under the judicial system created by the State of Maryland, an order vacating a judgment and awarding a new trial, upon motion, after the expiration of the term, was, as we have seen, freely reviewable, on error or appeal.

And as long as that order continued to be so reviewable, the substitution of a remedy *by motion*, instead of *audita querela* or writ of error *coram vobis*, involved only a change in the form of proceeding and could be attended with no inconvenience, in practice.

The substituted remedy was the exact equivalent, in effect, of the proceedings it displaced.

But, under the system established by the Judiciary Act of 1789, only the *final* judgments or decrees, whether of the Circuit Courts, under sections 21 and 22, or of the State tribunals, under section 25, could be re-examined in this Court.

Here, also, could be reviewed only the *final* judgments orders or decrees of the Circuit Court for the District of Columbia, under Act Cong. February 27, 1801, Sec. 8, retained in *U. S. Rev. Stat., D. C.*, Sec. 846.

But the order of a Court having power to make it, setting aside its judgment and awarding a new trial, could not be regarded as *final*, within the meaning of the Acts here regulating the appellate jurisdiction.

And if the Circuit Court, either of the District of Columbia or for the State of Maryland, might lawfully set aside its judgments and grant new trials, upon motion, after whatever lapse of time, its orders, in that respect, must rest, in effect, in its own uncontrolled discretion.

The remedy by motion would be no longer the equivalent of a remedy by *audita querela* or writ of error *coram nobis*, the judgment upon either of which might here be corrected on error.

The distinction would cease to be matter of form.

It would relate "to the *power* of the courts and not to the mode of procedure."

Bronson v. *Schulten*, 104 U. S., 417.

By Act Cong., February 27, 1801, Sec. 3, (2 Stat., 105), to the Circuit Court for this District, and the judges thereof, were granted "all the powers by law vested in the Circuit Courts, and the judges of the Circuit Courts, of the United States."

And by Act of Cong., March 3, 1863, Sec. 3 (12 Stat. 762), establishing the Court below, as well as by Rev. Stat. D. C., Sec. 760, that Court, "it is provided, shall possess *the same powers* and exercise the *same* jurisdiction as the Circuit Courts of the United States."

By the retention in the District of Columbia of the laws of the State of Maryland, and of the common law, as part of them, the Circuit Court in that District, in cases where the laws of Maryland or the common law, as part of them, had conferred upon the State tribunals a more extensive power than had been vested by Congress in the Circuit Courts of the United States, became, of course, invested with like power, yet, where neither the laws of that State, nor the common law, as part of them, furnished a different standard,

the powers of that Court were subjected to the limitations imposed by the legislature upon the powers of the Circuit Courts of the United States, in general.

The purpose of Congress to maintain as much uniformity between the powers and jurisdiction of the tribunal established by their authority for the District of Columbia, and the powers and jurisdiction of the Circuit Courts, in general, as the peculiar relation of the United States towards that District, might conveniently permit, has thus, been constantly manifested.

The judiciary Act of 1789, Sec. 17 (U. S. Rev. Stat., Sec. 726), conferred upon the national tribunals, power to grant new trials, for reasons for which new trials had been usually granted in the courts of law.

And by Sec 18 of the same Act (U. S. Rev. Stat., Sec. 987), on judgment entered after verdict, in a civil action, in any Circuit Court of the United States, execution might there, at the discretion of the Court, be stayed for forty-two days thereafter, upon motion and security, in order to allow time for the filing of a petition for a new trial, and, also, until the next session of such court, if the petition were filed within such forty-two days, with a certificate from the judge or judges of leave to file.

It could not readily be claimed, that new trials had been usually granted in the courts of law for *any* reason, upon mere motion, made after whatever lapse of time.

And, as shown in the section last mentioned, "it was not the policy of Congress to suspend the operation of a judgment, so as to allow an application for a new trial in any case beyond a period of forty-two days from the time of its rendition."

Cambuston v. *U. S.*, 95 U. S., 288.

The provision of U. S. Rev. Stat., D. C., *Sec.* 850, respecting the supersedeas and stay of execution of judgments of the Court below, has already been noticed.

So, writs of error from this Court, under the Act of 1789, and, appeals under the Act of March 3, 1803, were subject to *limitation*.

But under the practice in Maryland, the discretion of the courts was the only limitation to motions to set aside final judgments and award new trials.

The authority exercised by the courts of Maryland over their final judgments, by motion, after the expiration of the term, was founded upon general reasoning, and claimed as a power native and inherent in all judicial tribunals.

But the courts of the United States, with the exception of this tribunal, were well understood to be, though not technically, of *inferior*, yet, actually, of *limited*, jurisdiction, and dependent, for their powers, upon the affirmative grants of Congress.

Upon the organization of a national court in the District of Columbia, or for the State of Maryland, that tribunal became, of necessity, and to the exclusion of the local tribunals, the judge of the powers with which it had been vested under the laws of the United States.

And the reasoning in support of their possession of any particular power, that was felt by the State Courts to be entirely satisfactory, might have appeared to the Federal tribunal, quite insufficient to warrant its assumption of like authority.

The considerations suggested in explanation of the practice actually in force in the District of Columbia, whether

they were such as appealed, in fact, to its Circuit Court, or not, in establishing that practice, are such, it is submitted, as are proper to be weighed by this Court, in determining whether they will affirm the action of the court below, in subverting that practice, after its continuance for more than eighty years.

And it is to be observed, that, by the judgment of the General Term, it is not only determined "*that there is no error in the record and proceedings of the special term*," but that, after this *exercise* of jurisdiction, the appeal is 'dismissed' (*Rec.* 22), as is explained in the opinion, for *want* of jurisdiction to review the order appealed from, on account of its purely discretionary character. (See *Brief Deft. in Error, pp.* 17–21.)

The Circuit Courts of the United States are without power to set aside their final *decrees*, on motion, after the expiration of the term.

Cameron v. *McRoberts*, 3 *Wheat.*, 591;
McMicken v. *Perin*, 18 *How.*, 511;
French v. *Hay*, 22 *Wall.*, 245.

And the possession of such power by the Supreme Court of the District of Columbia, is there expressly disclaimed.

Fries v. *Fries*, 1 *MacA.*, 291.

Are its judgments at law entitled to less respect than its decrees in equity?

Under *Rev. Stat. D. C., Sec.* 804, the trial justice, in the court below, may, in his discretion, entertain a motion, to be entered on his minutes, to set aside a verdict and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages,—but subject to the qualification,—that "such motion shall be made at the same term at which the trial was had."

Coughlin v. *District of Columbia*, 106 *U. S.*, 9.

May every judge of that court, also, upon motion,—made after whatever lapse of years,—set aside a verdict and judgment and grant a new trial, at his unappealable discretion, for mere irregularity in the proceedings?

But even the courts of Maryland never entertained a motion to vacate their final judgments, after the expiration of the term, unless under a view of all the circumstances of the case, and in the absence of all *laches* on the part of the defendant and his agents.

Craig v. *Worth*, 47 *Md.*, 282–3;
Smith v. *Black*, 51 *Id.*, 247;
See, also, *Hill* v. *Reifsnider*, 46 *Id.*, 555.

The cases are numerous.

Green v. *Hamilton*, 16 *Md.*, 317;
Kemp & Co. v *Cook, &c.*, 18 *Id.*, 130;
Henderson v. *Gibson*, 19 *Id.*, 234;
Montgomery v. *Murphy*, *Id.*, 576;
Hall v. *Holmes*, 30 *Id.*, 558;
Taylor v. *Lyndall*, 34 *Id.*, 58;

Tiernan v. *Hammond*, 41 *Id.*, 548;
Loney v. *Bailey*, 43 *Id.*, 10;
Craig v. *Worth*, 47 *Id.*, 29;
Abell, &c., v. *Simon*, 49 *Id.*, 322;
Smith v. *Black*, 51 *Id.*, 247;
Gibbons v. *Cherry*, 53 *Id.*, 144.

The doctrine to be extracted from them is, that, in exercising an equitable jurisdiction over its own judgment, the court will act only in analogy to those principles upon which relief against the judgment would be afforded upon a bill in chancery.

There was nothing presented upon the motion below, to justify the interference of any court with the judgment recovered.

As to negligence.

The affidavit of defense had been filed on the 26th of October, 1874.

Harrington had removed to Delaware on or about the 1st of March, 1875.

He gave no notice of his removal to the defendant because, as he asserted, he considered that the plaintiff had abandoned his case and that the litigation was ended.

This conclusion was deduced from the circumstance, that, for a period of four months and five days, the plaintiff had omitted "*to join issue or take action on the pleas.*" (*Rec.* 15.)

But the consequences of this omission, if it occurred, could be declared only by the court, upon motion and no-

tice. The motion must have been addressed to the discretion of the court.

And sufficient might appear, on the hearing, not only to explain and excuse the default of the past, but to justify further indulgence.

"The negligence of *defendant's attorney*" was specially set up by *Negley* below.

But it is scarcely more conspicuous than the negligence of the defendant himself.

From 1874 until 1882, the defendant made no inquiry concerning his case.

He reposed upon the statement of *Harrington*, that a defense had been put in, and that the plaintiff could not recover.

---

2. But it was never the plaintiff who was in default, for want of a replication.

It was the defendant who was in default, for want of a plea

The tendency of legislation and of practice has been to require an affidavit in support of the plea, in most actions, especially when brought under oath, founded upon contracts in writing.

5 *Rob. Pract.*, 308 *et seq*;
Chambers County v. *Clem*, 21 Wall., 322;
Alexander v. *Bryan*, 110 U. S., 414.

In some of the States, the want of an affidavit renders the plea *demurrable*.

Bell v. *Corporation of Vicksburg*, 23 How., 444.

In others, it prevents the reception of the plea.

C. & R. R. Bank, &c. vs. *Slocumb et al.*, 14 Pet., 63; See *Hitchcock* vs. *Buchanan*, 105 U. S., 416.

But the *plea* and the *affidavit* are distinct things and subserve different purposes.

The former is the statement of fact which the defendant opposes to the declaration.

The latter is the solemn testimony of the pleader to the truth of his statement.

The one is designed to raise with clearness and facility, a single, certain and material issue.

The other is intended to discourage sham defences, by requiring that the issue thus raised shall not be false, frivolous nor contrived for vexatious purposes.

The plaintiff, in an action *ex contractu*, may often have judgment by default, unless the defendant shall file, *along with his plea*, an affidavit of defense.

And the plaintiff may also have judgment by default, *for want of a plea.*

A plea, without an affidavit, does not prevent such judgment.

An affidavit, without plea, does not prevent such judgment, more than an affidavit, without a declaration, would authorize such judgment.

The plaintiff, at the time of bringing his action, had filed an affidavit, in support of his declaration.

And an *affidavit* was filed in defense, by *Negley.*

No *plea* was interposed to the declaration.

And at any time between October 26, 1874 and May 3, 1877, the plaintiff might properly have moved for judgment, *for want of a plea*.

That, upon such a motion, the court might have allowed time for the defendant to plead, cannot destroy the fact that *for two years and a half*, the defendant continued in default, for want of a plea.

But, the plaintiff was not compelled to take judgment for want of a plea.

If he perceived there was no prospect of obtaining from the defendant a formal plea to the declaration, he might properly *elect to treat the affidavit of defense as a plea*, and secure a trial on the merits.

And this was in fact done.

It is true, that the plaintiff might have had the defendant called at the trial, and taken judgment by default, for non-appearance.

But this was the *privilege* and not the obligation of the plaintiff.

Under the familiar practice, he might submit his pretentions to a jury.

And it would require some refinement to explain how the rights *of the defendant* would be more injuriously affected by such a submission, than by a peremptory judgment, awarded without inquiry and as the penalty of default.

It is extraordinary, that the plaintiff, after having waited two years and a half for the defendant to plead to the action, should be charged with default in exercising this election.

If the affidavit of *Negley* might properly be treated as a plea, it amounted, of necessity, to the *general issue*.

And that *Harrington* should have supposed, not only that the plaintiff was required to *join issue upon the general issue*, but that the suit became abandoned by his failure to do so, is not to be lightly excused.

The forms of the general issues in the court below. have never concluded to the country, and no formal conclusion is there necessary in any pleading.

The *similiter*, therefore, is unknown to our practice.

It is now the settled rule in equity, that a person can there obtain relief against a judgment, only when the recovery has been "*unmixed with any fault or negligence in himself or his agents.*"

Marine Ins. Co. v. *Hodgson*, 7 *Cranch*, 336;
Truly v. *Wanzer et al.*, 5 *How.*, 142;
Humphreys v. *Legett et al.*, 9 *Id.*, 313;
Hendrickson v. *Hinckley*, 17 *Id.*, 445;
Hungerford v. *Sigerson*, 20 *Id.*, 161;
Ballance v. *Forsyth et al.*, 24 *Id.*, 185;
Kibbe v. *Benson*, 17 *Wall.*, 628;
Crim v. *Handley*, 4 *Otto*, 653;
Brown v. *County of Buena Vista*, 5 *Id.*, 159;
Life Ins. Co. v. *Bangs*, 103 *U. S.*, 782;
Embrey v. *Palmer*, 107 *Id.*, 11;
Cragin v. *Lovell*, 119 *Id.*, 198.

And such is the doctrine in Maryland.

Gott v. *Carr*, 6 *G. & J.*, 309;
Saucer v. *Young*, *Id.*, 243;
Union Bank v. *Poultney*, 8 *Id.*, 324.

It is admitted even by the learned judge who decided the motion below, it must be shown, "that the interference

of equity is necessary to prevent injustice which has not been brought about by the negligence or inattention of the party aggrieved."

Bohrer v. *Fay*, 3 *MacA.*, 150-151.

If "*the negligence of defendant's attorney*" would constitute, in a court of equity, an insuperable *objection* against disturbing the judgment, it is difficult to comprehend how such negligence could be successfully invoked, in a court of law, as a *reason* for vacating the judgment.

As to fraud and deceit.

It is scarcely necessary to say, that this ground of the motion finds no support from any portion of the record.

Mattingly not only mailed notice to *Harrington*, but, from abundant caution, to *Negley* also.

As to irregularity.

Though the particular irregularity upon which the defendant relies, does not appear from the motion, or otherwise in the record, it is claimed, in the Brief of the defendant in error, p. 5, to consist both in the tardiness of the plaintiff in joining issue, and in the want or insufficiency of the service of replication and notice of trial.

The first objection has already been considered in another connection.

By *U. S. Rev. Stat., D. C., Sec.* 802, it is provided: "At any time after issue, and at least ten days before the sitting of the Court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least four days

before the sitting of the Court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon a calendar, according to the date of the issue."

Service of the replication and of notice of trial, was sought to be effected in a manner entirely appropriate to the situation of the defendant and his attorney.

It is the method prescribed by Rule 6, of this Court, in analogous cases.

The papers were forwarded by mail, and in envelopes bearing, in print, the name and address of the sender, to whom they have never been returned.

No obligation was imposed upon the plaintiff, or his attorney, to proceed or send to Delaware or Pennsylvania, in order to effect personal service upon *Harrington* or his client.

And if *Negley* and his attorney really failed to receive due notice, it was only because the latter had removed from the District, and left the cause of the former unrepresented by local counsel.

The precise date at which these papers were mailed by *Mattingly* to the defendant and his attorney, does not appear from the record.

They were so mailed, however, "more than ten days prior to May Term, 1877."

The replication and note of issue were filed in the clerk's office on the 3d day of May.

A letter might be mailed from Washington to Dover, Delaware, and received at its destination by the person addressed, in the same business day.

The cause remained on the trial calendar from May 7, 1877, until April 3, 1879.

No new notice to the defendant or his attorney was necessary.

Goddard v. *Ordway*, 101 *U. S.*, 751.

Mattingly had addressed notices of trial to both, about two years before the trial. These notices had not been returned to him by the post office, as was usual, in case of non-delivery. He was justified in supposing that they had reached the persons addressed. From these persons he had heard nothing. And he was justified in supposing that their silence was intentional.

The order drawn by *Negley* was accepted by the drawees to be paid out of the money to be received by them upon the judgment. (*Rec.*, p. 3.)

In his affidavit of defense, *Negley* had admitted the execution of the order, but denied his personal liability upon it. (*Id.*, p. 5.)

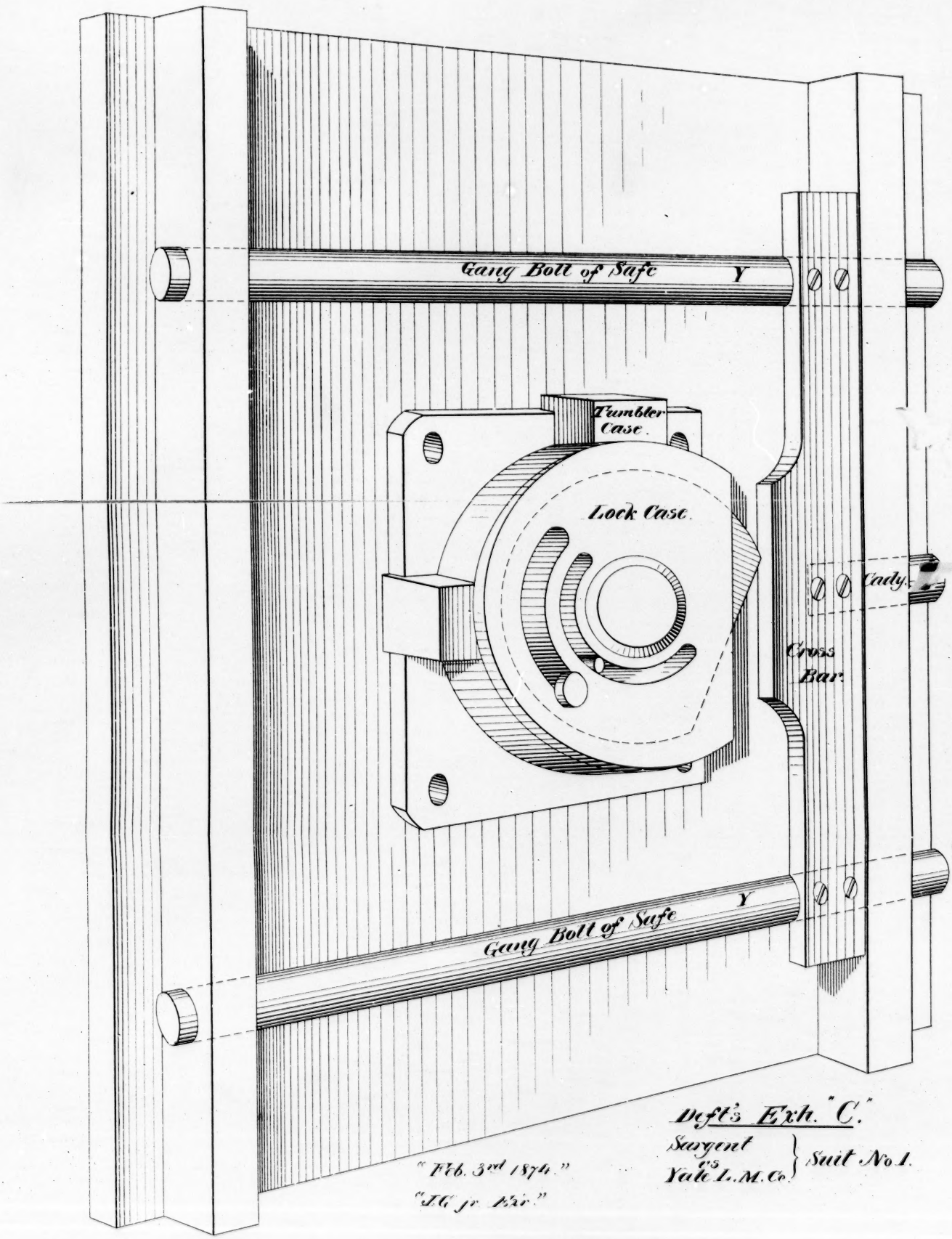
That it was known to the plaintiff, when receiving the order, *Negley* held no funds in the hands of the drawees, is, indeed, asserted in a subsequent affidavit. (*Id.*, p. 11.)

Yet it could scarce be expected that serious defense would be attempted before a jury, when proof was at hand, that the defendant had fraudulently prevented payment of the order by the acceptors, by withdrawing the fund from their control. (*Id.*, p. 17.)

As to surprise.

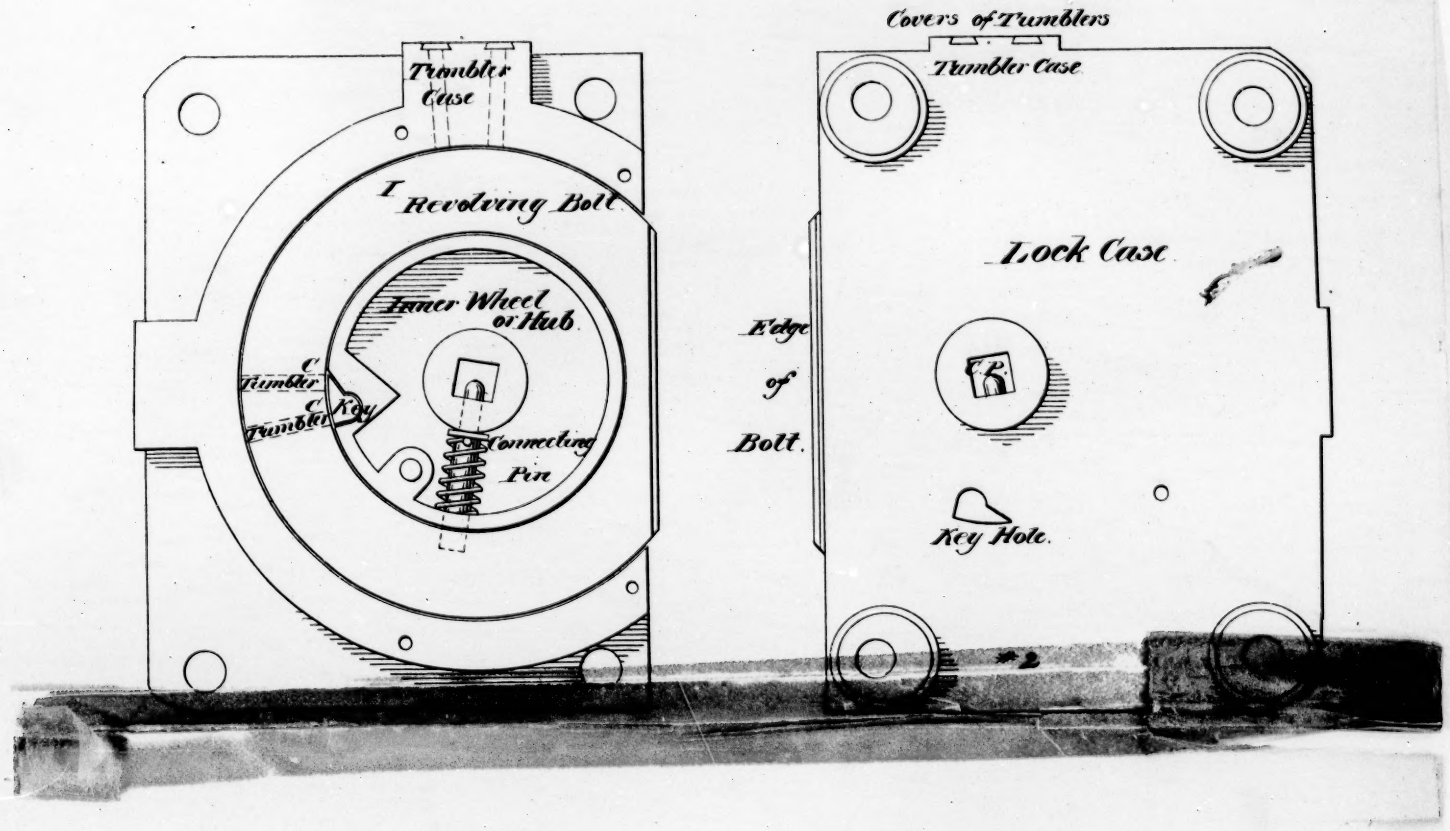
It follows, from what has been already mentioned, that, if the defendant was surprised, his situation was attributable to the negligence of himself and his counsel.

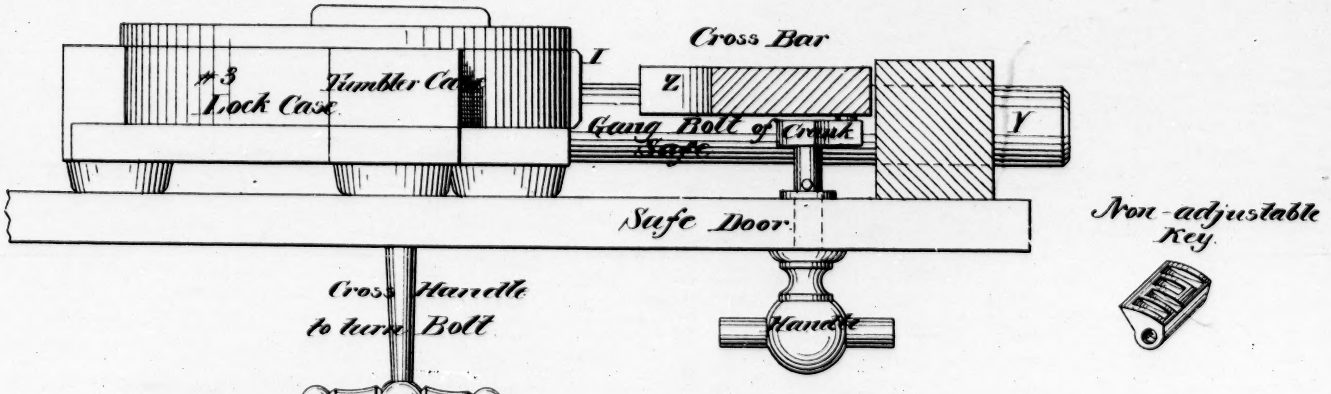
JOHN SELDEN,
W. HALLETT PHILLIPS,
Counsel for Pl'ff. in Error.



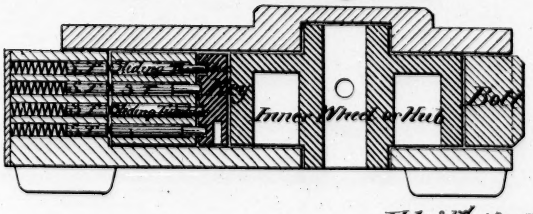
Deft's Exh. "C."
Sargent vs Yale L. M. Co. } Suit No 1.

"Feb. 3rd 1874."
"J.G. jr Asst."





Non-adjustable Key



Adjustable Key

Feb 3rd 1874
J.G jr. Exr.

Defts' Exh. "D"

Sargent vs Yale L M Co. } Suit No 1.

Plate 2. 2 Sheets.

LYMAN F. MUNGER.

Improvement in Permutation Locks.

No. 4,596. Reissued Oct. 17, 1871.

Fig. 1.

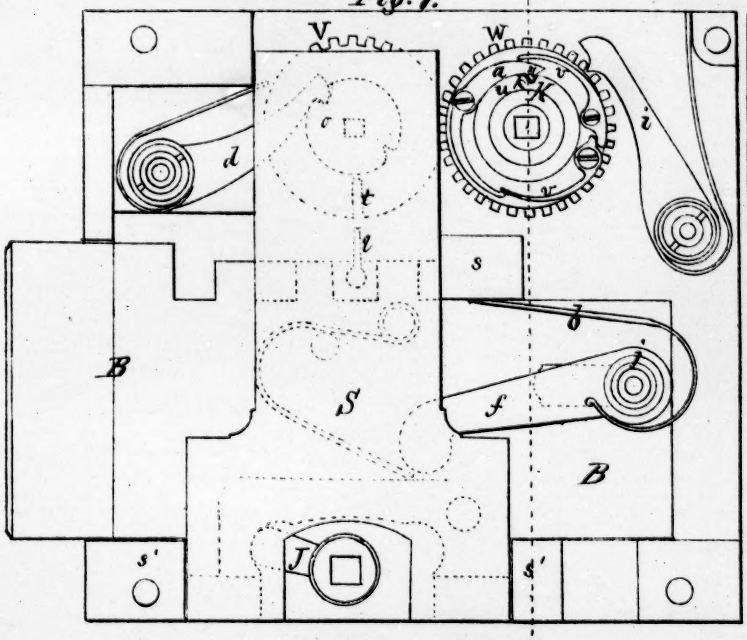


Fig. 2.

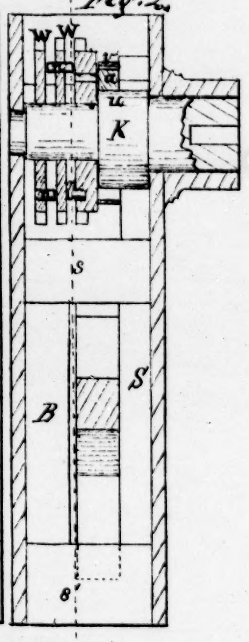


Fig. 3.

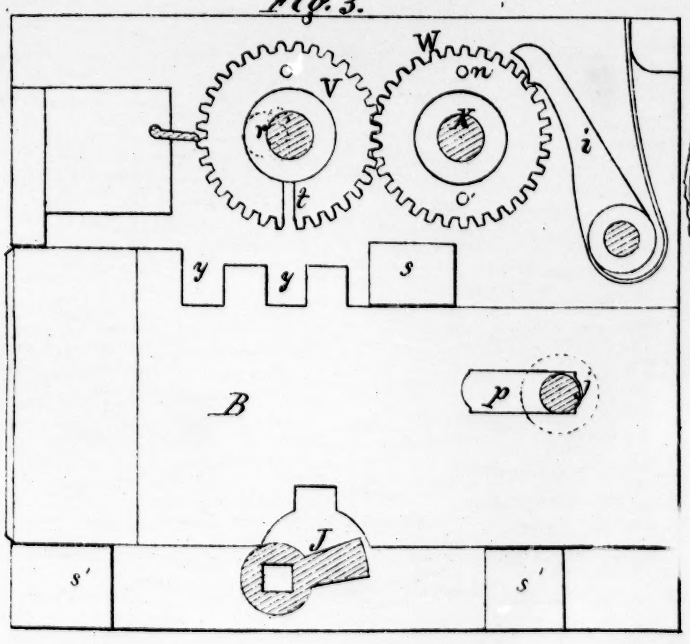
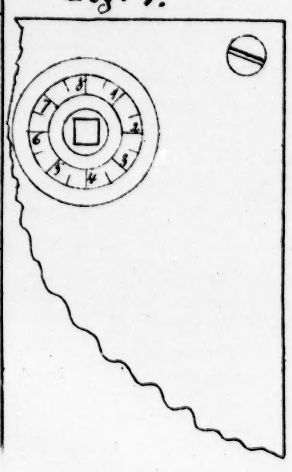


Fig. 4.



Witnesses.
Harry K. Phillips
W. K. Boyd Jr.

Inventor:
Lyman F. Munger,
per Burke Fraser & Osgood,
attys - Rochester, N.Y.

A.M. PHOTO-LITHOGRAPH. CO. N.Y. (OSBORNE'S PROCESS.)

Plate II. 2 Sheets.

LYMAN F. MUNGER.

Improvement in Permutation Locks.

No. 4,596. Reissued Oct. 17, 1871.

Fig. 5

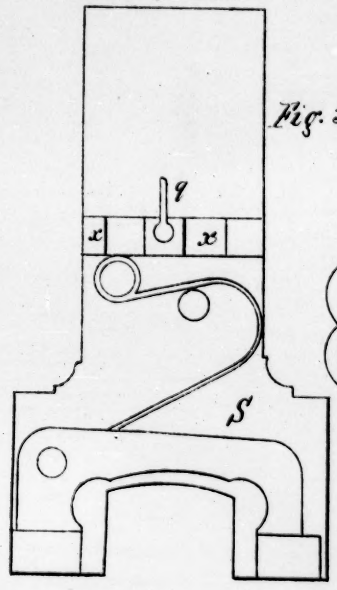


Fig. 7.

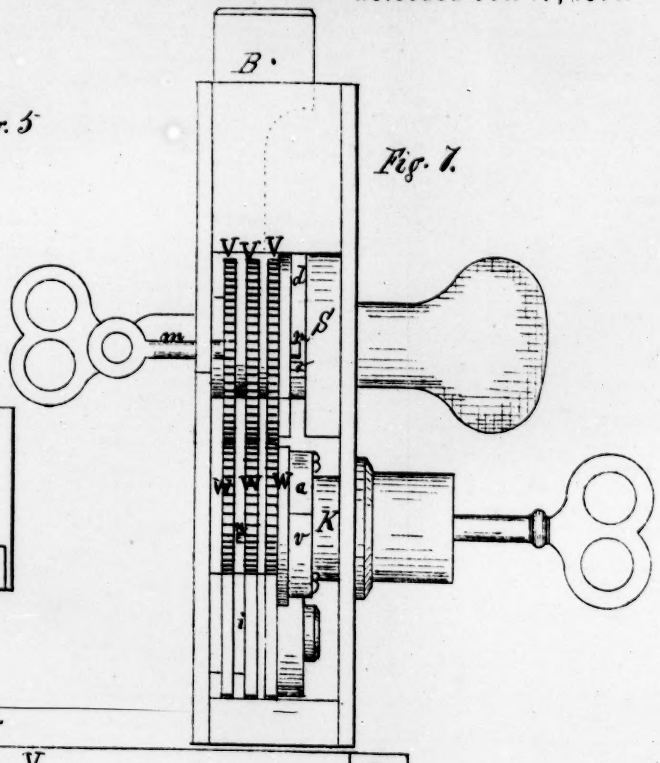


Fig. 6.

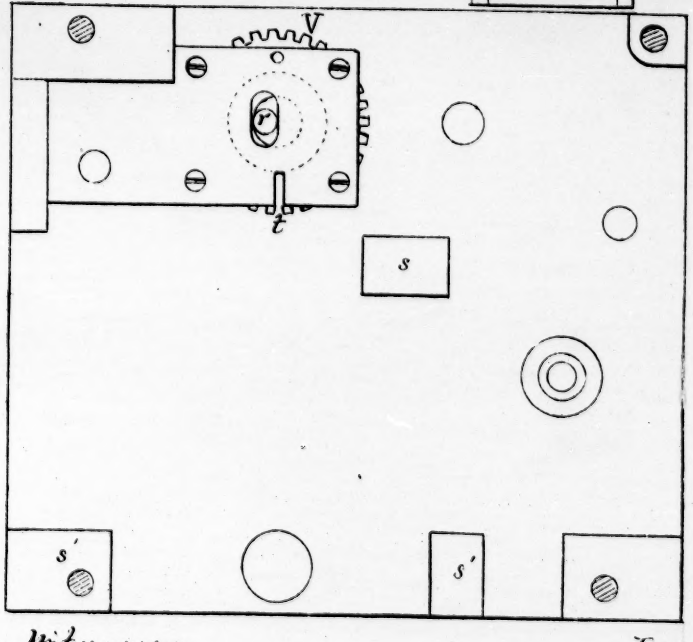


Fig. 8

Witnesses
Harry H. Phillips
P. H. Smith Jr.

Inventor.
Lyman F. Munger,
by Burke, Fraser & Osgood,
attys Rochester, N.Y.

AM. PHOTO-LITHOGRAPHIC CO. N.Y. (OSBORNE'S PROCESS.)

E. Stockwell

IMPROVED

DIAL LOCK.

117478

PATENTED JUL 25 1871

Fig 1.

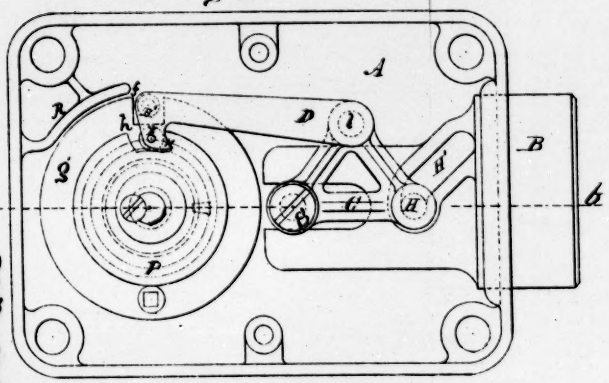


Fig 3.

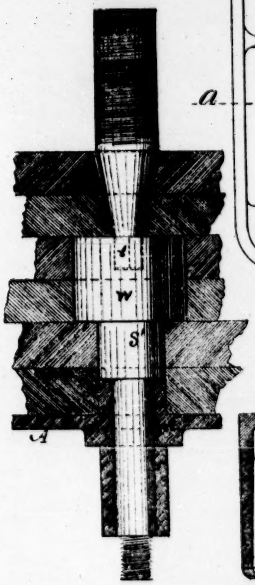
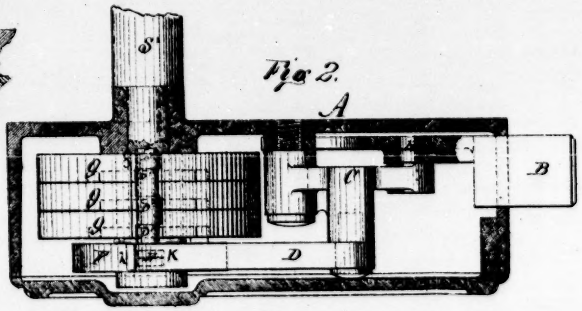
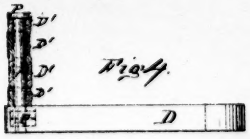


Fig 2.





WITNESSES.

H L Wattenberg

Rufus Hoyt

INVENTOR

E. Stockwell.

per G. W. Plympton.

Atty

AM. PHOTO-LITHOGRAPHIC CO. N.Y. (OSBORNE'S PROCESS.)

2 Sheets—Sheet 2

J. H. BUTTERWORTH.

Combination Lock.

No. 1,193.

Reissued June 4, 1861

Fig: 3.

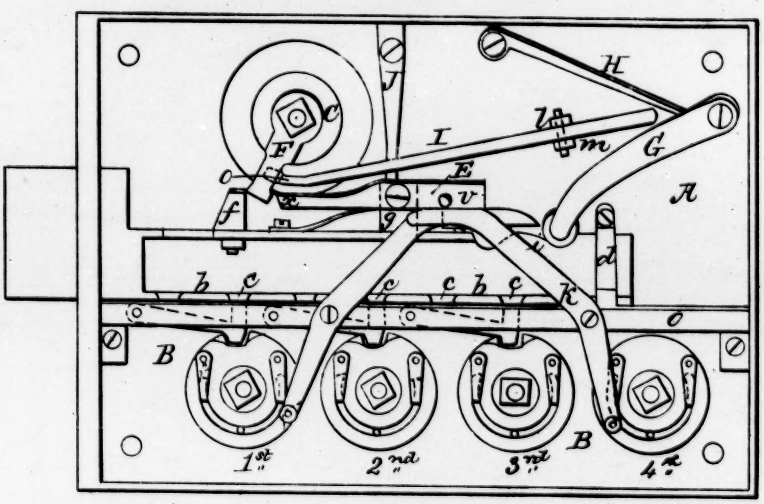


Fig: 4.

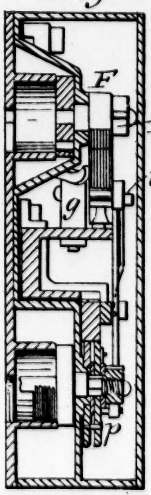
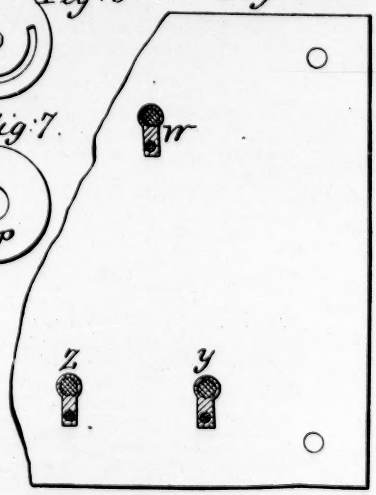


Fig: 5.

Fig: 6.

Fig: 7.

Fig: 8.



2 Sheets—Sheet 1.

J. H. BUTTERWORTH.

Combination Lock.

No. 1,193. Reissued June 4, 1861.

Fig: 1.

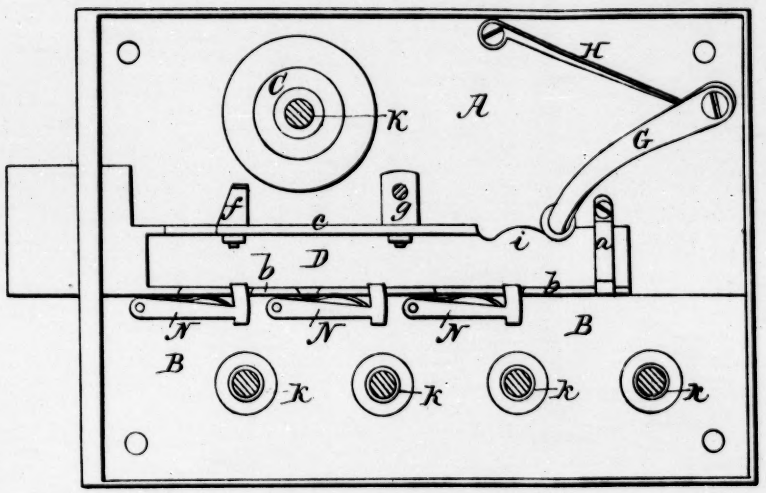
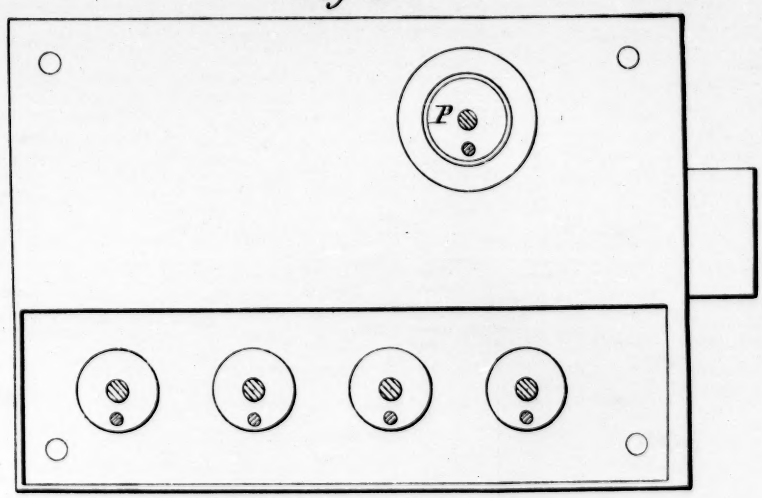


Fig: 2.



Witnesses.
R. J. Gunsen
E. Chas. Hastings

N. PETERS. Photo-Lithographer. Washington, D. C.

Sheet 1. 2 Sheets

J. H. Butterworth,

Combination Lock,

No. 4,452 Patented Apr. 11, 1846.

Fig. 1.

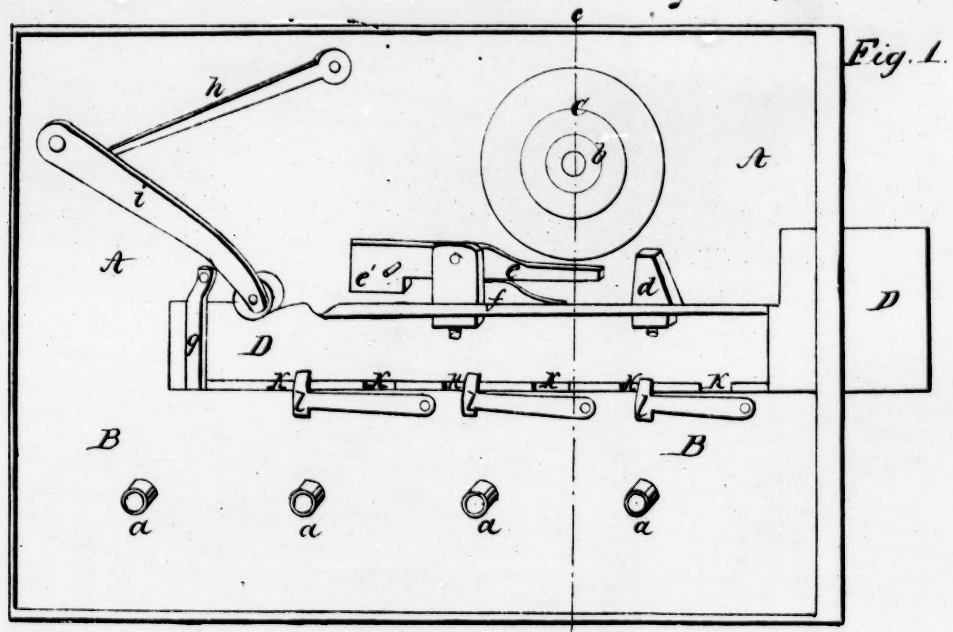


Fig. 2

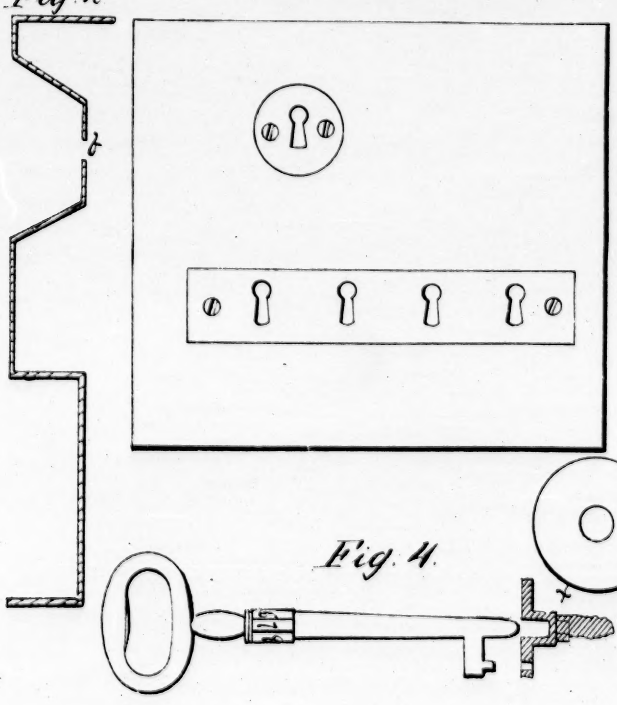


Fig. 6

Fig. 8.

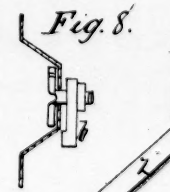


Fig 9.

Fig. 4.

Sheet 2 - 2 Sheets

J. H. Butterworth,

Combination Lock,

No. 4,452, Patented Apr. 11, 1846.

Fig. 5.

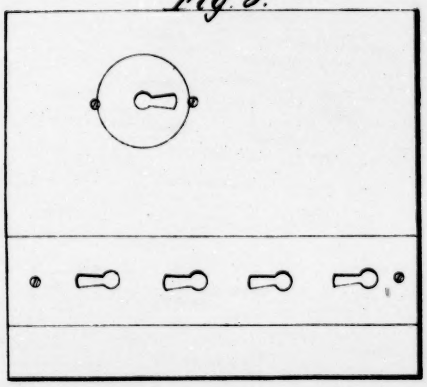


Fig. 3.

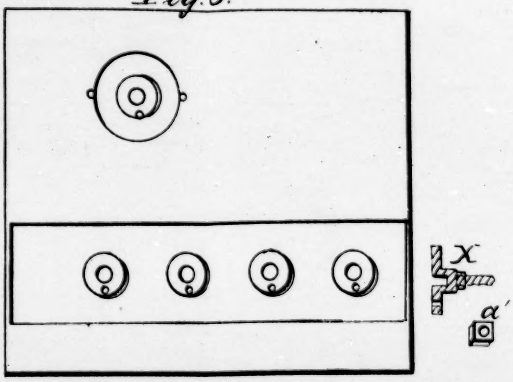
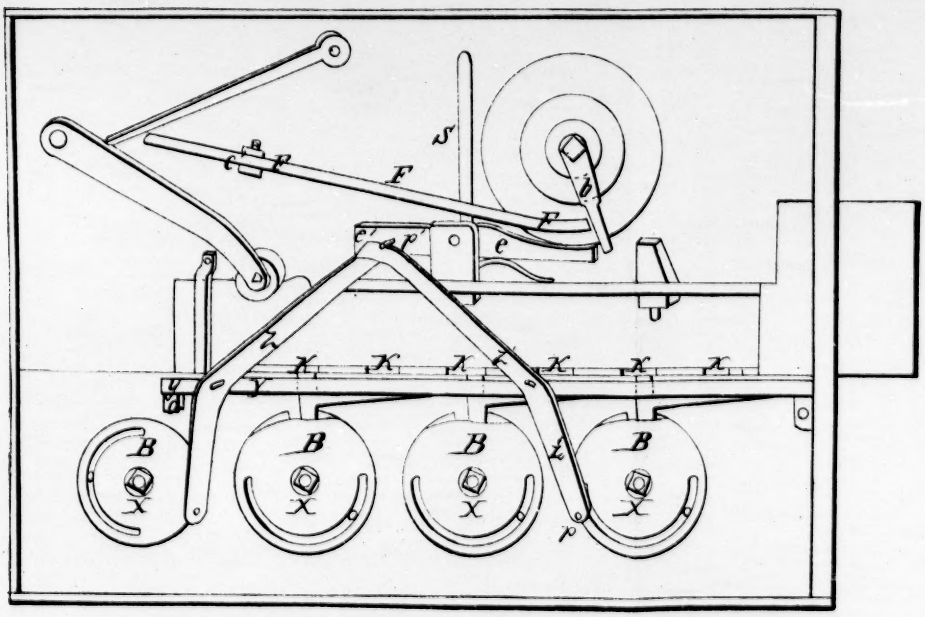


Fig. 7.



J. Sargent,

Permutation Lock.

No. 98,622. Patented Jan. 4, 1870.

FIG. I.

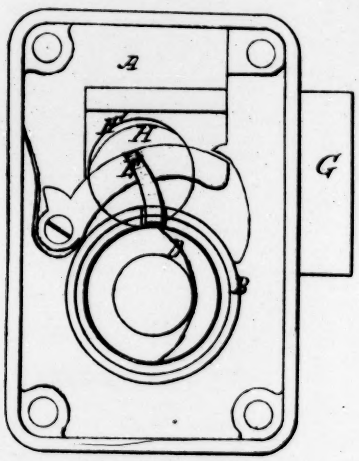


FIG. II.

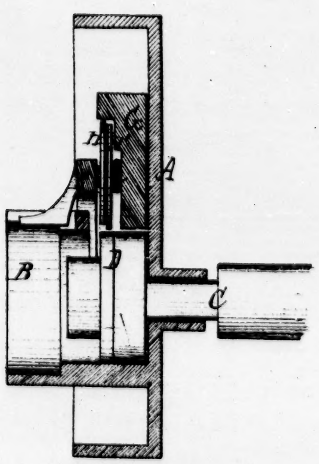
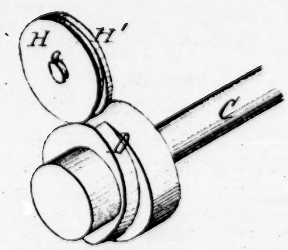


FIG. III.



Witnesses:

Inventor.

James Sargent

SPECIAL NOTICE

TO

Applicants and Policy-holders.

THE FOLLOWING FACTS RELATING TO CONTRACTS BETWEEN THIS COMPANY AND ITS POLICY-HOLDERS, ARE OF SPECIAL IMPORTANCE TO ALL CONCERNED, NAMELY:

1st.—Policies issued prior to June 23d, 1873, in favor of a wife, in conformity with the statute for the benefit of married women in insuring the lives of their husbands, are not assignable for any purpose. Earlie vs. Simmons, 26 N. Y. Reports (Court of Appeals), page 1.

But wives' policies issued subsequent to June 23d, 1873, may be surrendered to and purchased by the Company under the provisions of an Act of the Legislature of New York, chapter 821, passed June 23d, 1873, upon the written request of the wife, duly acknowledged before an officer authorized to take acknowledgments of deeds, in the same manner as required by law to pass her dower right in the lands of her husband. And in case the wife has no child or children, nor any issue of any child or children, she may dispose of such policy by will or by deed duly acknowledged.

2d.—This Company cannot entertain any proposition on the part of the husband to change the interest in a wife's policy, while said policy is in force in her favor.

3d.—The Company does not agree to restore a policy after lapse for non-payment of premiums; and when, in special cases policies are restored, satisfactory evidence of the insurable condition of the party must be given.

4th.—No Policy-holder must expect to be notified when his premium will be due. It is the practice of the Company to send these notices, as reminders, WHEN THE ADDRESS IS KNOWN, but no responsibility is assumed on the part of the Company in consequence of their non-reception.

5th.—It is absolutely necessary, in making inquiries, to state the number of the policy as well as the name of the assured; much annoyance and time to both inquirer and the Company will be avoided by observing this suggestion.

6th.—The fact that a policy has a large amount of additions to its credit, gives no authority to the Company to apply them to the payment of premiums, without written direction from the party interested.

TENTH AND CHESTNUT STREETS, PHILADELPHIA.

AN ACT

FOR THE BENEFIT OF MARRIED WOMEN IN INSURING THE LIVES OF THEIR HUSBANDS.

Passed April 14, 1858—As Amended March 28, 1862, and April 18, 1870

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1 It shall be lawful for any married woman, by herself, and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life; and in case of her surviving such period or term, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors, or any party or parties claiming by, through, or under him. But when the premium paid in any year out of the property or funds of the husband shall exceed five hundred dollars, such exemption from such claims shall not apply to so much of said premium so paid as shall be in excess of five hundred dollars, but such excess, with the interest thereon, shall inure to the benefit of his creditors.

§ 2. The amount of the insurance may be made payable, in case of the death of the wife before the period at which it becomes due, to her husband, or to his, her or their children, for their use as shall be provided in the policy of insurance and to their guardian if under age.

NAME OF PERSON ASSURED

DO NOT WRITE HERE. $10.000 ×L John M Armstrong

APPLICATION TO

THE MUTUAL LIFE INSURANCE COMPANY

Of New-York,

140 to 146 BROADWAY. P

No. of Policy, 187427

Kind of " E 20. Yr Due 1897

Date of " 8 day of Dec 1877

Am't of " $ 10.000.

Age of Party, 41 Years.

1/4 year Ann'l Premium, $ 138.60

% Extra "

Policy Fee, - - $ 1

JC $ 139.60

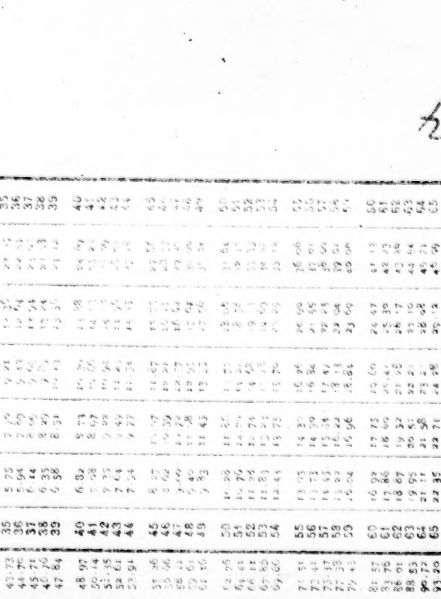
The above blank spaces are to be filled up only at the New-York Office.

Vanuxem, Bates & Lambert
General Agents
Company's Building
N.W.C. 10th & Chestnut Sts. Phila., Pa.

Edition Jan. 1st. 1876.

H. Austice & Co., Stationers, 83 Nassau Street, New York.

COMPANY'S OWN BUILDING,



Received Dec. 3. 77 Mutual Life Ins. Co. N. Y.

BROADWAY AND LIBERTY STREET, NEW YORK.

BOARD OF TRUSTEES.

Frederick S. Winston,	John E. Develin,	William F. Babcock,
Robert H. McCurdy,	Martin Bates,	F. Ratchford Starr,
William Betts,	William A. Haines,	Frederick H. Cossitt,
Samuel E. Sproulls,	Seymour L. Husted,	Lewis May,
Samuel M. Cornell,	Oliver H. Palmer,	Oliver Harriman,
Lucius Robinson,	Henry E. Davies,	Thomas Dickson,
William Smith Brown,	Richard A. McCurdy,	Henry W. Smith.
William H. Popham,	Francis Skiddy,	John H. Sherwood,
Samuel D. Babcock,	James C. Holden,	Egisto P. Fabbri,
Henry A. Smythe,	Herman C. Von Post,	George H. Andrews,
William E. Dodge,	George C. Richardson,	Robert Olyphant,
George S. Coe,	Alexander H. Rice,	

FREDERICK S. WINSTON, President.
RICHARD A. McCURDY, Vice Pres't.

ROBERT A. GRANNISS, Second Vice-Pres't. — WILLIAM H. C. BARTLETT, LL.D. Actuary.

ISAAC F. LLOYD, Secretary. — OLIVER H. PALMER, Solicitor

GUSTAVUS S. WINSTON, M. D., W. R. GILLETTE, M. D. } Medical Examiners.

☞ *Note carefully the name of this Company, The Mutual Life Insurance Company of New-York, that it may not be confounded with others somewhat similar.* ☜ obud

1

AN ACT

TO AMEND AN ACT ENTITLED AN ACT TO AMEND AN ACT ENTITLED AN ACT TO AMEND AN ACT ENTITLED AN ACT FOR THE BENEFIT OF MARRIED WOMEN IN INSURING THE LIVES OF THEIR HUSBANDS, PASSED APRIL FOURTEENTH, EIGHTEEN HUNDRED AND FIFTY-EIGHT, PASSED APRIL EIGHTEENTH, EIGHTEEN HUNDRED AND SEVENTY.

PASSED JUNE 23, 1873; THREE-FIFTHS BEING PRESENT.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. The second section of the act entitled "An act to amend an act entitled an act to amend an act entitled an act for the benefit of married women in insuring the lives of their husbands, passed April fourteenth, eighteen hundred and fifty-eight, passed April eighteenth, eighteen hundred and seventy," is hereby amended so as to read as follows:

§ 2. Any policy in favor of a married woman or of her husband, or of both, or assigned or transferred to her or them, or in favor of her children, or any of them, or assigned in her, or their favor, on written request of said married woman, duly acknowledged before a commissioner of deeds, or other officer authorized to take acknowledgments of deeds, or in the same manner as required by law, to pass her dower right in lands of her husband, which request, specially naming such policy, shall invest the person or persons to whose said policy shall have been so transferred, or granted and conveyed, with the same rights in respect thereto as such married woman would have had in case she survived the person on whose life such policy was issued, and such legatee or grantee shall have the same right to dispose of such policy as herein conferred on such married woman.

§ 3. This act shall take effect immediately.

This act, however, applies only to policies issued since the first day of January, 1873.

PREMIUM RATES FOR AN INSURANCE OF $1000.

Life Policies, payable at Death only.

Age.	ANNUAL PAYMENTS FOR				Age.	SEMI-ANNUAL PAYMENTS FOR				Age.	QUARTER-ANNUAL PAYMENTS FOR				Age.
	Life.	20 Years.	15 Years.	10 Years.	5 Years.		Life.	20 Years.	15 Years.	10 Years.	5 Years.		Life.	20 Years.	15 Years.	10 Years.	5 Years.	
25	16.91	24.35	29.25	39.39	70.43	25	8.60	12.38	14.87	20.03	35.81	25	4.34	6.24	7.50	10.11	18.09	25
26	17.34	24.81	29.86	40.12	71.74	26	8.82	12.61	15.15	20.40	36.48	26	4.45	6.36	7.64	10.29	18.39	26
27	17.79	25.30	30.38	40.86	73.09	27	9.05	12.86	15.45	20.79	37.16	27	4.56	6.49	7.79	10.49	18.75	27
28	18.26	25.80	30.98	41.68	74.49	28	9.28	13.12	15.75	21.19	37.86	28	4.68	6.62	7.94	10.69	19.10	28
29	18.76	26.33	31.66	42.54	75.95	29	9.54	13.39	16.07	21.61	38.60	29	4.80	6.75	8.11	10.91	19.49	29
30	19.29	26.89	32.35	43.37	77.47	30	9.81	13.67	16.40	22.05	39.39	30	4.93	6.89	8.27	11.12	19.86	30
31	19.85	27.47	33.03	44.27	79.05	31	10.09	13.97	16.74	22.51	40.19	31	5.07	7.04	8.44	11.35	20.26	31
32	20.44	28.07	33.64	45.20	80.69	32	10.39	14.27	17.10	22.98	41.03	32	5.21	7.19	8.61	11.58	20.69	32
33	21.06	28.70	34.37	46.17	82.39	33	10.71	14.59	17.48	23.48	41.89	33	5.36	7.35	8.80	11.83	21.13	33
34	21.73	29.36	35.14	47.18	84.16	34	11.05	14.93	17.87	23.99	42.79	34	5.52	7.51	8.99	12.08	21.55	34
35	22.42	30.05	35.94	48.23	86.00	35	11.40	15.28	18.27	24.54	43.73	35	5.70	7.69	9.21	12.36	22.05	35
36	23.16	30.78	36.78	49.34	87.90	36	11.78	15.65	18.72	25.12	44.74	36	5.89	7.88	9.43	12.65	22.57	36
37	23.94	31.54	37.66	50.50	89.87	37	12.17	16.04	19.15	25.66	45.71	37	6.09	8.08	9.66	12.94	23.13	37
38	24.78	32.34	38.57	51.69	91.96	38	12.60	16.44	19.61	26.26	46.76	38	6.30	8.29	9.90	13.25	23.63	38
39	25.66	33.18	39.52	52.94	94.09	39	13.03	16.87	20.09	26.89	47.84	39	6.52	8.51	10.16	13.58	24.19	39
40	26.61	34.07	40.52	54.16	96.31	40	13.53	17.36	20.66	27.54	48.97	40	6.80	8.73	10.42	13.95	24.84	40
41	27.66	35.03	41.57	55.50	98.61	41	14.03	17.86	21.24	28.22	50.14	41	7.05	8.98	10.72	14.31	25.49	41
42	28.86	36.08	42.66	56.89	100.99	42	14.57	18.39	21.86	28.90	51.35	42	7.32	9.25	11.03	14.68	26.14	42
43	29.79	37.20	43.81	58.34	103.46	43	15.13	18.95	22.52	29.65	52.65	43	7.61	9.53	11.36	15.08	26.83	43
44	30.99	38.37	45.01	59.86	106.03	44	15.71	19.53	23.21	30.44	54.01	44	7.91	9.83	11.69	15.51	27.57	44
45	32.27	39.58	46.29	61.43	108.68	45	16.44	19.97	23.84	31.26	55.46	45	8.27	10.05	12.00	15.92	28.26	45
46	33.64	40.91	47.63	63.08	111.44	46	17.16	20.68	24.72	32.23	57.08	46	8.64	10.41	12.44	16.36	29.04	46
47	35.11	42.31	49.09	64.81	114.39	47	17.95	21.46	25.68	33.38	58.93	47	9.04	10.80	12.92	16.90	29.96	47
48	36.66	43.80	50.65	66.66	117.44	48	18.84	22.32	26.69	34.66	60.93	48	9.48	11.23	13.43	17.50	30.94	48
49	38.33	44.08	52.08	68.48	120.49	49	19.49	22.72	27.40	35.58	62.45	49	9.81	11.43	13.79	17.91	31.64	49
50	40.10	46.35	53.72	70.43	123.43	50	20.39	23.59	27.37	35.51	62.30	50	10.26	11.87	13.77	17.86	31.54	50
51	41.96	47.93	55.45	72.47	126.68	51	21.35	24.37	28.29	36.85	64.61	51	10.74	12.26	14.23	18.53	32.50	51
52	44.01	49.70	57.28	74.60	130.02	52	22.38	25.27	29.32	38.17	66.89	52	11.26	12.71	14.75	19.20	33.64	52
53	46.16	51.80	59.21	76.81	133.46	53	23.47	26.24	30.44	39.55	69.36	53	11.81	13.20	15.31	19.90	34.89	53
54	48.47	53.62	61.25	79.13	137.00	54	24.65	27.26	31.64	40.93	71.80	54	12.41	13.72	15.92	20.60	36.08	54
55	50.92	55.79	63.41	81.54	140.64	55	25.89	28.37	32.84	41.49	72.91	55	13.03	14.28	16.52	20.88	36.68	55
56	53.55	58.12	65.70	84.07	144.38	56	27.23	29.55	34.15	43.17	75.87	56	13.71	14.88	17.20	21.73	38.19	56
57	56.35	60.63	68.11	86.73	148.23	57	28.66	30.85	35.65	44.70	78.57	57	14.43	15.53	17.95	22.50	39.55	57
58	59.35	63.38	70.73	89.49	153.18	58	30.18	32.18	36.98	46.36	81.50	58	15.19	16.20	18.63	23.34	41.01	58
59	62.55	66.15	73.50	92.49	156.55	59	31.81	33.61	38.37	47.98	84.34	59	16.04	16.96	19.36	24.20	42.54	59
60	65.99	69.14	76.45	95.46	166.43	60	33.55	35.22	38.87	48.54	85.58	60	16.92	17.75	19.60	24.47	43.13	60
61	69.67	72.36	79.61	98.68	164.73	61	35.42	36.89	40.48	50.57	89.15	61	17.86	18.67	20.42	25.50	44.96	61
62	73.59	75.84	83.00	102.09	169.15	62	37.40	38.71	42.20	52.74	92.99	62	18.87	19.55	21.28	26.59	46.89	62
63	77.74	79.56	86.62	105.69	173.72	63	39.50	40.64	44.03	55.04	97.04	63	19.93	20.51	22.21	27.76	48.94	63
64	82.13	83.49	90.51	109.52	178.51	64	41.73	42.68	45.93	57.48	101.36	64	21.06	21.53	23.18	28.98	51.11	64
65	86.77	87.67	94.71	113.57	183.59	65	44.09	44.80	47.98	59.96	105.76	65	22.25	22.61	24.20	30.23	53.33	65

2024

Plaintiff Exhibit 6. Dec 5. 1881 B.L.B

The Particular Attention of Applicants is called to the INSTALMENT FEATURE, which is fully explained in the Company's Documents.

Plaintiffs Exhibit 6. Dec 5. 1881 B.L.B.

DO NOT WRITE IN THIS SPACE OR ABOVE IT.

Ans clause

Application for Insurance in Form A

THE MUTUAL LIFE INSURANCE COMPANY OF NEW-YORK

140 to 146 BROADWAY, CORNER OF LIBERTY STREET, NEW-YORK CITY.

The following questions will be answered by the person proposed for Insurance.

1. A. Give your full Name. John M. Armstrong

Occupation or Employment; if more than one, state all. Music Typographer Music of every description. Electrotyper

Former Residence, if recently changed.

RESIDENCE. Town, 804 No. 17th St. County, Phila. State, Penna.

PLACE OF BUSINESS. 710 Sansom St

Former Occupation, if recently changed.

☞ In giving the Occupation of the Person, it is not sufficient to state (for example) that he is a Merchant or Mechanic, but the particular branch of Business, or the actual Trade, must be specified.

2. A. Give the Name of the person for whose benefit the insurance is proposed. B. Residence. C. Post-Office Address. D. Relationship. E. State whether this person has an interest in the life proposed for insurance to the full amount applied for. F. Are you aware that the Company will not be liable for insurance procured on any single life for over $30,000 (the prescribed limit)?

A. Heirs & assigns
B. —
C. —
D. —
E. —
F. Yes

3. A. Do you wish the Policy made payable in One Sum or in Instalments? One sum

3. B. If in instalments, how many? —

3. C. Do you wish such instalments to be Annual, Semi-Annual, or Quarterly? —

4. A. State the amount of Insurance applied for. B. The kind of Policy desired. C. Whether the Premium is to be paid annually, semi-annually, or quarterly. D. If for the benefit of the wife of the person proposed for insurance, state precisely whether it shall be paid to her children, to his children, or to the children of the two, if she be not living at its maturity. E. If an Endowment Policy is applied for, state to whom it shall be paid in case of the death of the beneficiary before the maturity of the contract.

A. $10000
B. 20 year endowment
C. Quarterly
D. —
E. —

5. A. State your Place of Birth. B. The Date of Birth.

A. New York City
B. Janry 5. 1837

6. A. What is your Age at the nearest birthday? B. Weight? C. Height? D. Are you Married?

A. 41
B. 132
C. 5 7½
D. Yes

7. A. Are you now insured in this Company? B. If so, for how much? C. Give the Number and Amount of each Policy.

A. No
B.
C.

8. Is your Life now insured in any other Company? If yes, give the Name of each Company, and the Amount in each.

Provident $2500 Manhattan $2500

9. Have you made any proposal or opened a negotiation with any person for insurance upon your life in any Company, upon which a Policy has not yet been issued? If so, give the Name of each Company, and the Amount proposed in each.

No

10. Are you engaged in the manufacture or sale of intoxicating drinks? Have you ever been so engaged? State full particulars.

No — No

Dated at Phila this 5 day of Dec. 1877

Signature of the person proposed for Insurance, Jno. M Armstrong

In the presence of J. W. Vanuxem

APPLICATION.—Form B.

Questions to the Person proposed for Insurance, the Answers to which are to be submitted to the Medical Examiner,

Who will witness the signatures thereto.

1. Are you the same person described in Question 1, Form A, of this Application? Are your full Name, Residence, and the other particulars there mentioned, correctly answered and recorded? Have you carefully read the answers given in Form A, and is the signature thereto your own proper signature?

Yes — Yes

2. Has any application for insurance upon your life ever been made to any company upon which a Policy has not been granted? Has any unfavorable opinion upon the insurableness of your life ever been given by a physician? In either case, state full particulars.

No

3. Are you now in good health? Have you always enjoyed good health?

Yes — Yes

4. Have you been subject to or had any of the following Disorders or Diseases? Headaches severe, frequent or protracted; Loss of Consciousness; Dizziness, Fits or Convulsions, Paralysis, Delirium Tremens, Sunstroke, Apoplexy, Insanity, Habitual Cough, Asthma, Bronchitis, Pleurisy, Inflammation of the Lungs, Spitting or Coughing of Blood, Consumption, or any form of trouble referable to the Lungs; Shortness of Breath, Palpitation of the Heart, Difficulty in Swallowing or any other symptom indicating Disease of the Heart or neighboring vessels; Dyspepsia, Habitual Constipation, Chronic Diarrhœa, Dysentery, Bilious, Renal or Hepatic Colic; Hemorrhoids; any other Disease of the Stomach or Bowels; Jaundice, Liver Complaint of any form, Yellow Fever, Dropsy, Swelling of the Feet, Hands or Eyelids; Difficulty in Urinating, Excessive or Scanty Secretion of the Urine, Gravel or any symptom pointing to Bladder or Kidney trouble; any Disease of the Genital or Urinary Organs; Syphilis, Neuralgia, Rheumatism, Suppurating Glands, General Debility, Gout, Palsy, Eruptions or Disease of the Skin; Cancer, Erysipelas, Open Sores, Lumps or Swellings of any kind, Fistula, Varicose Veins.

No

5. Have you been subject to or had any difficulty with your Eyesight or Sense of Hearing?

No save dull of hearing effect of measles

6. Has your Weight recently increased or diminished? If so, to what extent and how rapidly, and to what cause do you attribute it?

No.

7. Have you ever had Inflammatory Rheumatism? If so, how many attacks? In what years? Duration? How Severe? Were they accompanied by Cough, Shortness of breath, Pain in the chest, Palpitation of the heart?

—

8. A. Are you ruptured? B. What form? Single or double? C. Is it reducible? D. Is a suitable Truss worn?

A. Yes
B. Single
C. Yes
D. Yes

9. A. Have you ever had any malformation or injury, or undergone any surgical operation? B. If so, state fully its nature, duration and results.

A. No
B.

10. Have you any predisposition, either hereditary or acquired, to any Constitutional Disease? (as Consumption, Rheumatism, Syphilis, Insanity)

No

201

11. How long since you were successfully vaccinated? Yes

12. A. Describe fully your habit in regard to the personal use of alcoholic or other stimulants, narcotics and tobacco. B. What has been your habit in this respect through life? Temperate & always have been so

13. How long is it since you were attended by a Physician or have professionally consulted one? For what Disease? Give the name and residence of that Physician? That of your usual Medical Adviser?

14. State, so far as you know, what was the Age at Death, Cause of Death, Duration of Final Illness, and state of Previous Health of each of the following persons, if deceased? What is the Age and present State of Health of each of them, if now living?

	AGE IF LIVING.	CONDITION OF HEALTH	AGE AT DEATH.	CAUSE OF DEATH.	HOW LONG SICK.	PREVIOUS HEALTH.
FATHER,		Father left home & died when I was quite young. He knew				Edge of age or cause of death
MOTHER,	67	Good				
BROTHERS, 1	47	Good				
SISTERS, 0	—					
Father's Mother,			92	old age		
Father's Father,		Dont know				
Mother's Mother,			75	old age		
Mother's Father,		Dont know		Accident fell from building		

In giving the cause of death, avoid all indefinite terms, such as "General Debility," "Change of Life," "Fever," "Exposure," etc. If the word Childbirth be used, how long after delivery did death occur, and were there any symptoms of Disease of the Chest, such as Cough, Expectoration, etc.

15. Have your Grandparents or any of their descendants, died or suffered from Consumption, Scrofula, Insanity, Gout, Rheumatism, or any Pulmonary or Hereditary Disease? If so, what was the Age of such person at death? His or her Relationship to you? The Cause of Death? Answer in detail. No

16. Is there anything, or has there ever been anything in your Physical Condition, Family or Personal History or Habits, tending to shorten your Life, which is not distinctly set forth above? No

The following Declaration and Agreement must be signed by the person in whose favor a Policy is applied for and by the person whose life is proposed for Insurance.

It is hereby declared and agreed that all the statements and answers to the printed questions written upon the forms A. and B. which, together with this Declaration and Agreement, constitute an application to THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, for an insurance of ..... dollars upon the life of ....., are offered to the said Company as a consideration of the contract applied for, each of which statements and answers, whether written by his own hand or not, every person whose name is hereto subscribed adopts as his own, admits to be material, and warrants to be full, complete and true, and to be the only statements given to the Company in reply to its inquiries, and upon which, should the insurance applied for be granted, the Company's contract will be founded. And this application is submitted to the said Company, with the following express covenants and agreements: 1. That it will constitute no contract of insurance, until a Policy shall first have been issued and delivered by the said Company, and the first premium thereon actually paid, during the continuance of the life proposed for insurance, in the same condition of health as described in the application; 2. That if the insurance applied for be granted by the Company, the Policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the Policy, and that, in particular, no insurance shall be claimed to be thereby granted against death by self-destruction, nor shall any insurance thereby granted remain in force after health shall have been impaired by narcotics or alcoholic stimulants, or after the insured shall, without the consent of the Company in writing, signed by the President, Actuary or Secretary, pass or remain beyond the limits of residence and travel, or engage in any of the occupations or employments, specified upon the Company's form of Policy; and that the entire contract contained in the said Policy and in this application taken together shall be construed and interpreted, as a whole, and in each of its parts and obligations, according to the charter of the said Company and the laws of the State of New-York, the place of the contract being expressly agreed to be the principal office of the said Company in the City of New-York; 3. That in any distribution of surplus, the principles and methods which may be adopted by the Company for such distribution, and its determination of the amount equitably belonging to such Policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under the contract now proposed.

Dated at Phila this 5 day of 12 1877

A wife may sign by her husband, and children by their father, thus:
Wife—Mary Smith, by John Smith.
Children—Ellen Brown, Thomas Brown, by William Brown.

Signature of the applicant, ...

In the presence of Caspar Wister

Medical Examiner.

Signature of the person proposed for Insurance, Jno. M. Armstrong

ALTERATION OF POLICIES.—Changes in the manner of paying premiums (as from yearly to half yearly, or quarterly, or the reverse) can only be made at the end of a year, dating from the commencement of the Policy; and when such a change is desired by a Policy-holder, the Policy must be forwarded to the office of the Company for the proper and requisite indorsement.

A change of interest in a Policy can only be made on the written request of the legal owner of the Policy, and with the consent of the Company. The dates of payment cannot be changed after a Policy has been issued, and the amount assured can only be increased (if desired) by a new Policy. The fiscal (or business) year of the Company closes on the 31st of December. A Policy issued in any year must be dated within that year; it cannot be dated prior to the commencement, or subsequent to the close, of the fiscal year of the Company.

ASSIGNMENTS.—A wife cannot legally assign a Policy issued under the Married Women's Act for the benefit of herself and children. But see Special Notice to Applicants and Policy-holders, as to Policies issued subsequent to June 23d, 1873, printed on outside page.

This Company will not take notice of any assignment of this Policy, until a duplicate or a certified copy thereof shall be delivered to the Company at its principal office; and under no circumstances will the Company assume any responsibility for the validity of such assignment. If any claim be made under an assignment, proof of interest to the extent of the claim will be required.

EXTRA RATES.—Permits are required for travel or residence beyond the limits assigned in the Policy, and for hazardous occupations; for which application must be made to the principal office. Extra rates, in such cases, are always charged as a percentage on the amount assured, and not on the amount of premium. An Extra Rate of ½ of 1 per cent. is charged on the lives of Females until one year after they shall have safely passed the climacteric.

RECEIPTS FOR PREMIUMS, to be valid, must be issued from the office and be signed by the President or Secretary.

Form C.

MEDICAL EXAMINER'S REPORT.

1. Give Name in full of the person examined. Do you know him to be the person upon whose Life insurance is asked in the Application, and the same person described in forms A. & B.? Are his residence and occupation there correctly stated?

NAME. John M. Armstrong — No — States Yes

2. Is the risk affected by anything in his Residence or Occupation? — No

3. A Give his Weight. B. Height. C. Measure of Chest under clothing. D. At forced expiration. E. On full inspiration. F. Number of respirations per minute. G. Figure and general appearance. H. Measure of Abdomen. I. Race. K. Describe Color of Eyes and Hair, and any special Marks of identification.

A.	B.	C.
132	5. 7½	
D. 33	E. 36	F. 18
G. Slender	H. 32	I. White

K. Brown hair & eyes

4. A. Is the Respiratory Murmur Clear and Distinct over both Lungs? B. Is the character of the Respiration Full, Easy and Regular? C. Is there entire absence of indications of Disease of the Organs of Respiration or their Appendages?

A. Yes
B. Yes
C. Yes

5. A. Is the character of the Heart's action Uniform, Free and Steady? B. Are its Sounds and Rhythm Regular and Normal? C. Is there entire freedom from indications of Disease of this Organ or of the Blood-Vessels?

A. Yes — B. Yes
C. Yes

6. A. State the Rate and other Qualities of the Pulse. B. Does it intermit? C. Is it Irregular or Unsteady?

The rate of Pulse must be *written* out in full.

A.	B.	C.
Eighty four	No	No

7. Has the party ever had any serious illness, Constitutional disease or injury, if so state expressly. A. How long since? B. Its nature? C. Its duration? D. Whether any effect is perceptible upon the heart, lungs, kidneys, or other organs.

A.	B.
States none	
C.	D.

8. Is there anything discovered by you which influences the character of the risk, and which is not fully set forth in the answers? — Slight hernia left side wears a truss

9. A. In your judgment, is the person examined safely insurable? B. Do you think it advisable to seek for any further information concerning him? If so, request the person examined to obtain from his medical adviser the necessary information in writing.

A. Yes
B. No

In reviewing the Family record, the Medical Examiner should invariably explain obscure causes of death, such as "Dropsy," "Change of Life," "Cold," "Exposure," "Childbirth," "Debility," etc., and in case the applicant states he "does not know" the cause of death or duration of illness, the Medical Examiner should ascertain and state the reason why; and should question and report upon the point of possible hereditary disease.

I certify that the answers to the questions above are in my own handwriting, and that I have made in private a physical examination of the person proposed for insurance.

Dated at Vila this 15 day of 12 1877

Caspar Wister
Medical Examiner.

PREMIUM RATES FOR AN ENDOWMENT INSURANCE OF $1000.

Endowment Policies, payable as indicated, or at Death, if prior.

CONTINUED ANNUAL PAYMENTS.

Age.	In 10 Years.	In 15 Years.	In 20 Years.	In 25 Years.	In 30 Years.	In 35 Years.
25	100.23	62.65	44.46	34.04	27.54	23.30
26	100.27	62.71	44.54	34.14	27.66	23.46
27	100.32	62.77	44.62	34.24	27.80	23.64
28	100.36	62.84	44.71	34.36	27.95	23.84
29	100.43	62.92	44.80	34.49	28.12	24.06
30	100.50	63.00	44.91	34.62	28.30	24.31
31	100.56	63.09	45.02	34.78	28.51	24.58
32	100.64	63.19	45.15	34.96	28.74	24.89
33	100.72	63.29	45.30	35.15	29.00	25.23
34	100.81	63.41	45.46	35.36	29.29	25.60
35	100.91	63.54	45.64	35.61	29.61	26.01
36	101.02	63.69	45.84	35.88	29.97	26.47
37	101.14	63.85	46.06	36.18	30.37	26.98
38	101.27	64.04	46.31	36.52	30.81	27.54
39	101.42	64.24	46.60	36.90	31.30	28.16
40	101.58	64.48	46.91	37.32	31.85	28.84
41	101.76	64.73	47.27	37.80	32.46	29.59
42	101.97	65.01	47.67	38.33	33.14	30.42
43	102.21	65.36	48.12	38.92	33.89	31.32
44	102.48	65.74	48.63	39.58	34.73	32.31
45	102.78	66.17	49.20	40.32	35.65	33.40
46	103.13	66.65	49.85	41.15	36.67	....
47	103.53	67.19	50.56	42.07	37.79	....
48	103.98	67.81	51.37	43.09	39.03	....
49	104.49	68.50	52.27	44.23	40.39	....
50	105.06	69.26	53.27	45.48	41.87	....
51	105.70	70.12	54.38	46.86	....	....
52	106.41	71.08	55.61	48.38	....	....
53	107.20	72.14	56.98	50.06	....	....
54	108.08	73.32	58.50	51.89	....	....
55	109.07	74.63	60.17	53.90	....	....
56	110.16	76.09	62.02	....	....	....
57	111.38	77.71	64.06	....	....	....
58	112.73	79.51	66.31	....	....	....
59	114.23	81.50	68.78	....	....	....
60	115.90	83.71	71.49	....	....	....
61	117.75	86.15	....	....	....	....
62	119.81	88.84	....	....	....	....
63	122.09	91.81	....	....	....	....
64	124.63	95.08	....	....	....	....
65	127.43	98.68	....	....	....	....

SEMI-ANNUAL PAYMENTS.

Age.	In 10 Years.	In 15 Years.	In 20 Years.	In 25 Years.	In 30 Years.	In 35 Years.
25	50.90	31.80	22.61	17.31	14.00	11.85
26	50.99	31.89	22.65	17.36	14.06	11.93
27	51.01	31.97	22.69	17.41	14.13	12.02
28	51.04	31.95	22.73	17.47	14.21	12.12
29	51.07	31.99	22.78	17.55	14.30	12.24
30	51.10	32.03	22.83	17.60	14.39	12.36
31	51.13	32.08	22.89	17.68	14.50	12.50
32	51.17	32.13	22.96	17.77	14.62	12.65
33	51.21	32.18	23.03	17.87	14.75	12.83
34	51.26	32.24	23.11	17.98	14.89	13.02
35	51.31	32.31	23.20	18.10	15.06	13.23
36	51.36	32.38	23.31	18.24	15.24	13.46
37	51.42	32.47	23.42	18.40	15.44	13.72
38	51.49	32.56	23.55	18.57	15.67	14.00
39	51.57	32.67	23.69	18.76	15.92	14.32
40	51.65	32.78	23.85	18.98	16.20	14.66
41	51.74	32.92	24.03	19.22	16.51	15.05
42	51.85	33.07	24.24	19.49	16.85	15.46
43	51.97	33.23	24.47	19.79	17.23	15.93
44	52.11	33.43	24.73	20.13	17.66	16.43
45	52.26	33.64	25.02	20.50	18.13	16.98
46	52.44	33.89	25.34	20.92	18.65	....
47	52.64	34.17	25.71	21.39	19.24	....
48	52.87	34.48	26.12	21.91	19.84	....
49	53.13	34.83	26.58	22.49	20.53	....
50	53.42	35.22	27.08	23.12	21.29	....
51	53.74	35.65	27.65	23.83	....	....
52	54.10	36.14	28.28	24.60	....	....
53	54.51	36.68	28.97	25.45	....	....
54	54.96	37.28	29.74	26.38	....	....
55	55.46	37.95	30.60	27.41	....	....
56	56.01	38.69	31.54	....	....	....
57	56.63	39.51	32.57	....	....	....
58	57.32	40.43	33.71	....	....	....
59	58.08	41.44	34.97	....	....	....
60	58.93	42.56	36.35	....	....	....
61	59.87	43.80	....	....	....	....
62	60.92	45.17	....	....	....	....
63	62.08	46.68	....	....	....	....
64	63.37	48.34	....	....	....	....
65	64.80	50.17	....	....	....	....

QUARTER-ANNUAL PAYMENTS.

Age.	In 10 Years.	In 15 Years.	In 20 Years.	In 25 Years.	In 30 Years.	In 35 Years.
25	25.70	16.06	11.49	8.73	7.06	5.97
26	25.71	16.08	11.52	8.75	7.09	6.01
27	25.72	16.09	11.54	8.78	7.13	6.06
28	25.73	16.11	11.56	8.81	7.17	6.11
29	25.75	16.13	11.59	8.84	7.21	6.17
30	25.76	16.15	11.61	8.88	7.26	6.23
31	25.78	16.17	11.64	8.92	7.31	6.30
32	25.80	16.20	11.68	8.96	7.37	6.38
33	25.82	16.23	11.72	9.01	7.44	6.47
34	25.84	16.26	11.76	9.07	7.51	6.56
35	25.87	16.29	11.79	9.13	7.59	6.67
36	25.90	16.33	11.85	9.20	7.68	6.79
37	25.93	16.37	11.91	9.28	7.79	6.92
38	25.96	16.42	11.97	9.36	7.90	7.06
39	26.00	16.47	12.05	9.46	8.03	7.22
40	26.04	16.53	12.13	9.57	8.19	7.39
41	26.09	16.60	12.22	9.69	8.32	7.59
42	26.14	16.67	12.32	9.83	8.50	7.80
43	26.20	16.76	12.44	9.98	8.69	8.03
44	26.27	16.85	12.57	10.15	8.90	8.28
45	26.35	16.96	12.71	10.34	9.14	8.56
46	26.44	17.09	12.88	10.55	9.40	....
47	26.54	17.23	12.96	10.79	9.69	....
48	26.66	17.38	13.17	11.05	10.01	....
49	26.79	17.56	13.40	11.34	10.35	....
50	26.93	17.76	13.66	11.66	10.73	....
51	27.10	17.98	13.94	12.01	....	....
52	27.28	18.22	14.26	12.40	....	....
53	27.48	18.49	14.61	12.83	....	....
54	27.71	18.80	15.00	13.30	....	....
55	27.96	19.13	15.43	13.82	....	....
56	28.24	19.51	15.90	....	....	....
57	28.55	19.92	16.42	....	....	....
58	28.90	20.35	17.00	....	....	....
59	29.29	20.83	17.63	....	....	....
60	29.71	21.46	18.33	....	....	....
61	30.19	22.09	....	....	....	....
62	30.74	22.78	....	....	....	....
63	31.39	23.54	....	....	....	....
64	31.95	24.38	....	....	....	....
65	32.67	25.30	....	....	....	....

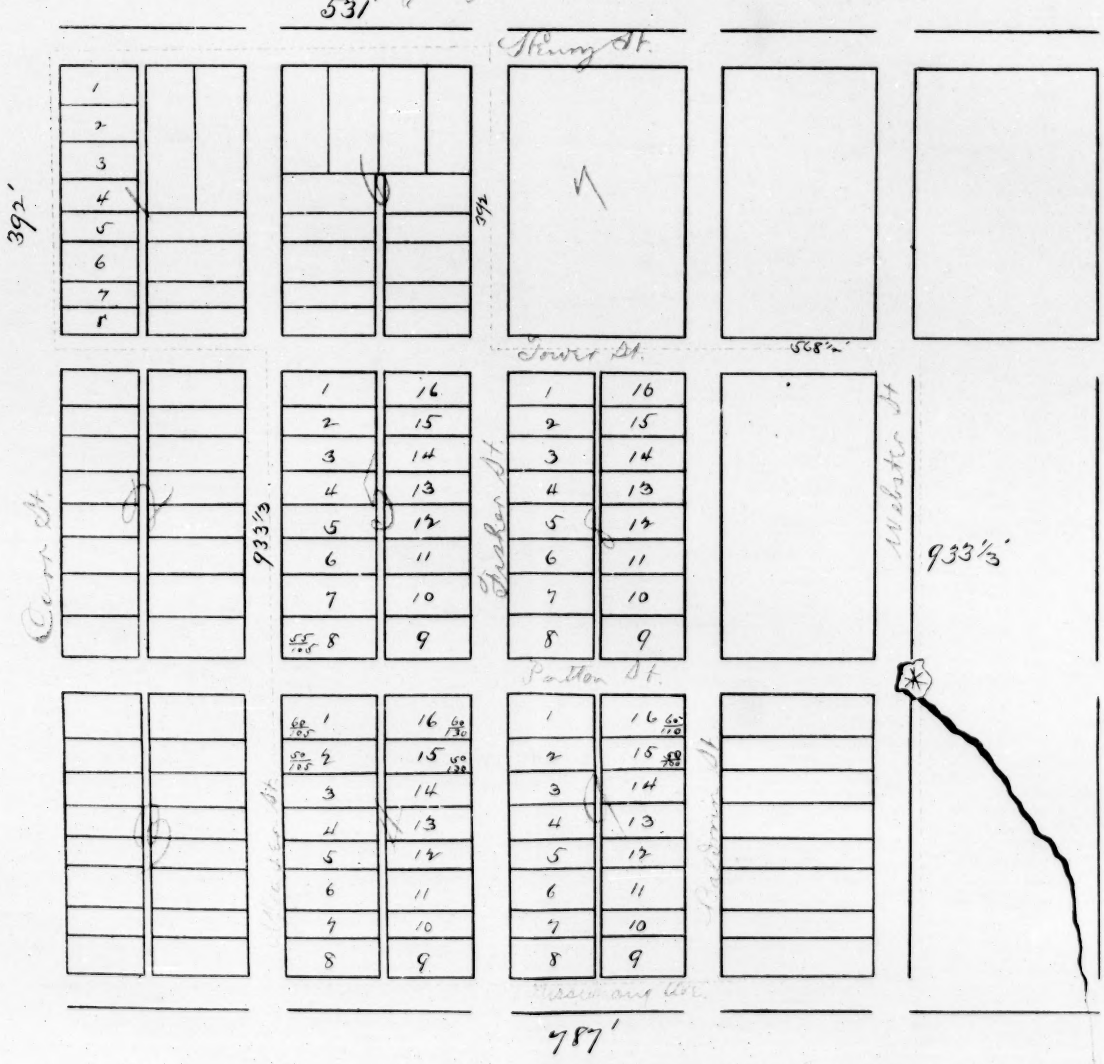
N. B.—For ages younger than 25 years, the rates of premium, on all the above Tables, are the same as that at age 25 years.

N.

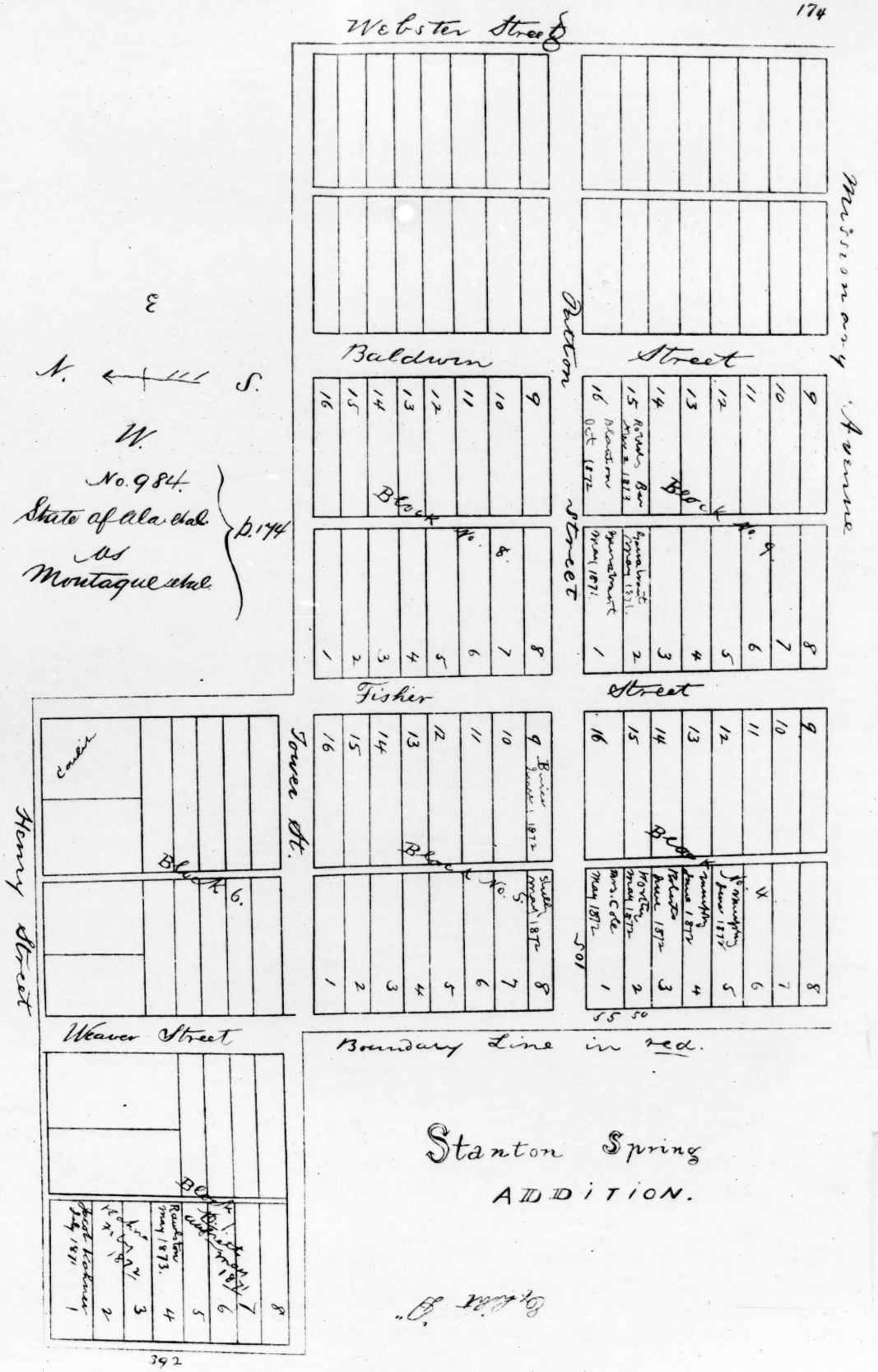
Exhibit to Plea of Montague, Wheeler, Tower Sherwood & Woodbury.

No. 335
State of Ala ehd.
vs.
Montague et al

p. 31. Plat Showing Blocks & Lots of the Stanton Spring Addition belonging to Montague & others.



The dotted line on the subdivision the boundaries of the original tracts comprising the Stanton Spring Addition


Webster Street
Baldwin Street
Fisher Street
Dutton Street
Division Avenue
Tower St.
Henry Street
Weaver Street
Boundary Line in red.
E
N.
S.
W.
No. 984.
State of Ala. Ind.
vs
Montague et al.
p. 174
Stanton Spring
ADDITION.